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Panel I Discussion: The Criminal Justice System: "George Floyd Bill" & Qualified Immunity

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Panel I Discussion:

The Criminal Justice System: "George Floyd Bill" & Qualified Immunity

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Hyperlink to presentation:

https://www.youtube.com/watch?v=EGKcAmz07e0

TRANSCRIPTION:

Howard Henderson

Good morning, and we welcome everyone to this first panel. We're so excited to have our guests with us this morning. Let me do a brief introduction so we can get into this conversation. This morning, we have Atty. Joanna Schwartz with us from UCLA. Atty. Schwartz is one of the legal experts that we came across when we were researching this space. We're so elated to have her be part of this conversation, and we will be glad to learn what she's able to bring to the table in terms of understanding qualified immunity and the George Floyd Act as it stands in Texas.

We also have April Frazier Camara, who has become a great colleague of mine, and who we now understand we have a lot in common. We are both from the same state of Tennessee, and we also know that she's a great legal mind. We're glad to have her here representing Washington, DC, and her group. April, we're so glad to have you here. We look forward to having a conversation, and we know that you're going to add a lot to what we bring to the table today.

We also have Chris Colbert, who is an expert in his own right. He will be able to explain his experience in interviewing individuals who have been family members of victims of qualified immunity and police abuse.

Now, let's kick this off with a conversation. Joanna, we have had plenty of previous discussions about qualified immunity and what that means. Can you tell us, in your own words, what qualified immunity means? Also, what are some of the most pressing challenges when dealing with qualified immunity around the country?

Joanna Schwartz

Thank you and thank you so much for having me here. It's an honor to be part of this conversation.

Qualified immunity is a defense that law enforcement officers and other government officials can raise when they are sued for money or damages in a civil rights suit. It happens when a person brings forward a case saying their constitutional rights have been violated. Then, a police officer or other government official can raise the defense of qualified immunity that indicates the case against should be dismissed, not because they didn't violate the Constitution, but because the right that was violated was not clearly established. What the definition of 'clearly established' is has changed over the years.

This doctrine was created by the Supreme Court. The Supreme Court has repeatedly issued divisions that make it harder to achieve this goal. Still, today, if you read the Supreme Court's decision, the message that they are clearly sending is that in order for a right to be 'clearly established,' or for a person to get past the qualified immunity defense, they have to find a prior court decision from court system they are part of (i.e., Court of Appeals) that held identical conduct as unconstitutional. If they can't find a case, as in the police officer has violated someone's rights in a way that hasn't been done before, then the officer can be dismissed from the suit.

The cases have to have very similar facts. There is a case, *Baxter v. Bracey*[1] in which a person was suspected of a burglary. He sat down, raised his hands in the air, and surrendered. The police still released their dogs on him. The dogs beat, bit, and maimed him.

This person brought forward a lawsuit, and the officers claimed qualified immunity. There was a prior case where police dogs had been released on someone who had surrendered lying down.[2] In that case, the court said that the action was unconstitutional, and it was excessive force.

The court considering the case of the man who had had the dog released on him while he was sitting with his hands in the air said, "The factual differences between someone lying on the ground and someone sitting with their hands in the air are enough to mean that the law was not clearly established."

The Supreme Court has made it even harder to move past this hurdle because they have told courts that they can grant qualified immunity without ruling whether the officer's conduct was unconstitutional. So, on the one hand, they're telling plaintiffs, "You have to find a prior case with virtually identical facts." And, on the other hand, they're telling courts, "You don't have to decide whether the Constitution was violated."[3] There's a lot of things wrong with qualified immunity.

The officer's intent doesn't matter to the analysis. The officer can intentionally violate the law knowing their actions were wrong. However, if there is not a prior court decision, it doesn't matter. The final thing to note is the standard requiring a prior court decision with virtually identical facts

[1] *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

[2] *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012).

[3] *Pearson v. Callahan*, 555 U.S. 223 (2009)

is justified by the Supreme Court on the idea that officers need to notice that what they are doing is wrong.

I've done research that reveals that officers are never educated about these cases. They're not told about the facts and underlying circumstances of every single court decision. They would never have the time to do that in their training. So, the whole notion that we need a prior court decision has no basis in how officers are actually trained.

The qualified immunity defense is justified as a protection for officers because they need financial protection from liability. I've done research that shows that officers virtually never pay in settlements or judgments entered against them. The whole justification for this defense, which is so harmful to people whose rights have been violated, isn't even needed under the justification that defenders of the doctrine offer for it.

Those are some of the problems with qualified immunity.

Howard Henderson

Thanks so much. Now, I want to get you in this conversation, Atty. April Frazier Camara. Again, I didn't want to spend a lot of time on the front end introducing everyone because I want to get into the conversation. You are an expert and a force to be reckoned with because you bring together some unique pieces to this conversation. One is in your position as the Director of the Black Public Defender Association associated with the National Legal Aid & Defender Association.

Talk to me about how you see all of this in terms of dealing with police officers, dealing with qualified immunity, and the impact of qualified immunity on the role of a public defender. How do you think it impacts the criminal justice system?

April Frazier Camara

First of all, thank you, Professor Henderson, for inviting me here today and organizing this amazing symposium to talk about this important issue. As you said, I'm the co-founder of the Black Public Defender Association, and one critical piece that we realized was missing, even in the public defender community, is an analysis of race and the criminal legal system. For Black defenders, we understand both professionally and personally how this impacts our communities. We also know the history of qualified immunity and it being used as a tool to justify the terrorism in our community by law enforcement.

One missing component, oftentimes when we do the legal analysis, is exploring historically how this tool has been used for legal justification of terrorism inflicted upon the Black community by law enforcement. Thus, there is no legal recourse for the Black community.

When we look at the origin of these doctrines, people have to understand why they have been so narrowly tailored and interpreted by the Supreme Court. You cannot divorce that analysis from an analysis of American history and the horrors of White supremacy in this country. That's what our conversations around policy reform, as Black defenders, bring together – the history of racism and the horrors of the criminal legal system.

As many of you know, 80% of people who come in contact with the criminal legal system are represented by public defenders. They cannot afford counsel. Oftentimes as public defenders, we see ordinary daily injustices that law enforcement and prosecutors turn a blind eye to the client we meet in lockup. The client has a black eye and is a female client who complains about an officer touching her inappropriately. Unless you get to the level of abuse and harm in cases like George Floyd, very rarely do you hear about those daily injustices that take place. It really, truly is a part of the culture of many law enforcement communities, but it is also a culture of the system that allows people to be harmed with there being no consequences.

For public defenders, what does it take for an officer like Derek Chauvin to have the courage to publicly lynch someone on a busy street in daylight? It took a number of ordinary, daily abuses and injustices that were never addressed, and oftentimes, public defenders may have raised those issues in court. They may have clients file complaints with the Citizen Complaint Review Board, and those calls are oftentimes ignored.

That's where we get to the level of abuse that makes the news because we allow for those daily injustices that happen every day. We may pass by a traffic stop where we see someone being abused or their rights being violated, and those daily abuses are never addressed. Then we get to a national awakening because you lynch someone in public.

I want to talk about how important it is for us to tie this legal analysis to the history of racism and White supremacy in this country. We also have to talk about how the American legal system has legalized a lot of the abuse. It's time for us to challenge them. Similar to Brown v. Board of Education, just because it's "legal" does not mean that it is just or equitable.

Howard Henderson

You've given us so much, April and Professor Schwartz. I wish I could take notes on what you both have given us. Unfortunately, I have to moderate this panel, and hopefully, my students are taking copious notes for me.

Chris, you bring a unique perspective to this conversation. When we look at your background, and when we understand where you're coming from, you have done some great work in making sure that people get this story in mainstream America. Particularly when we look at the projects that you've worked on around the country and the people you've worked with - one, in particular, comes to mind. Your project tells a story and helps us understand what it means to be victimized by the police in this country. Can you help us bring this down to the level where you've talked to the families of these victims and what you've learned through interviewing these individuals around the country?

Chris Colbert

Thank you, I'm very much humbled by being on this stage with all these great thought leaders and the great work that you all are doing.

We worked on a project called Say Their Name, a podcast series where we were going around the country talking to families about their loved ones who have been killed or assaulted by police. As

you were setting up there, it is important that we hear directly from these families because we don't often hear from them, and if we do, they tend to be in sound bites and clickbait articles that are meant to get your attention. These narratives tend to be controlled by the media and by the police, and so we wanted to hand this platform over to the families to give their perspective because let's just assume that the media's doing nothing nefarious. They still tend to take the police's side in terms of what the story is. They will run with that immediately, and part of that is because the media service is all about being the first out of the gate. A lot of times, they don't have time to fact-check things. They're just taking the police at their word, which many times is incorrect, as we found talking to these families. That's where it's important to talk to these families – to get their perspective and understanding not only of what happened but their journey for justice.

That's also where it plays into this qualified immunity conversation as these families are victimized. When they lose their loved one, or their loved one is assaulted, then there is a re-victimization that happens as you go through the court system. They delay the process to be able to get restitution. Obviously, now with COVID, you have other delays that are beyond their regular delay tactics. Now, you actually have a pandemic on top of that. But that costs money. That costs emotional and mental strain on these families on top of what they're already experiencing. Then when you look at qualified immunity, you are up against an unwinnable foe, as was touched on by Professor Schwartz earlier.

You have to prove now what the intent was or what the officer was feeling. How do you disprove what the officer is feeling if they're telling you they felt scared for their life?

One case in particular that I wanted to mention here is that of Robbie Tolan in Bellaire, Texas, which is just outside of Houston. Robbie was shot back in 2008, I believe, and he did live to tell his own story. I say it's kind of fortunate that he lived to tell his story, but let's not forget that he has lived every single day with the physical and emotional trauma of what he experienced. So, let's not look at him as a great success story. He is living this every single day, but at the same time, his family was actually able to fight all the way to the Supreme Court and win a case on qualified immunity.[4] It took them almost eight years to fight and get that case heard and won in the Supreme Court. To do so, they had to sell their home. This is a family where the father was a Major League Baseball player, almost a Hall of Fame baseball player on top of that. Robbie Tolan, the one who was shot, was actually drafted to the Washington Nationals and was in his first year of climbing up that system.

His career was taken away from him from being shot, and a family that is that well-off still had to sell their home to be able to fight against qualified immunity. That shows you how difficult it is and the strain that it takes on a family, just from a financial standpoint. Let's also remember that they had a home to sell. Not all families have a home to sell. They don't have those means to get money. Robbie's family also had favors from lawyers who were giving them pro bono work and things like that. That's not to throw the blame at the lawyers here. They also have to get paid to make a living.

[4] *Tolan v. Cotton*, 572 U.S. 650, 134 S. Ct. 1861 (2014)

At the same time, the system is set up for failure for many of our communities. I'm just going to recount one thing that a family member told us. Once, when they were in the courts, the judge said to the jurors, "If you think that the officer may have feared for their life, you must acquit." If that is what we're up against, we can't win.

With them [Robbie's family] winning the Supreme Court case within its first, I believe, five or six months, that case was cited in helping over 500 other court cases just within that first five months. That being said, we are still facing qualified immunity as an issue. Even though that is a precedent, it's not being applied at a great enough rate and scale to be able to actually help in the way that we need to.

We need to change laws. We can't just have a precedent. We have to change laws.

Howard Henderson

Chris, I really appreciate that because you provided us some context to this.

Joanna, let me ask you a question. You put out an interesting article in 2018, The Case Against Qualified Immunity[5], where you articulated the chinks in the armor of qualified immunity, per se. We are in the Fifth Circuit right now, well I am, and we understand what that means for qualified immunity. You articulated the places where qualified immunity received greater levels of support from the courts. Can you speak to that? What does that mean for us to be in these uniquely draconian areas of the country where qualified immunity seems to be a lot stronger than others? And, can you speak to how qualified immunity looks different in circuits like the Fifth Circuit?

Joanna Schwartz

Yes, thank you for that question. I really appreciate that. Chris mentioned Robbie Tolan as well as the case out of the Fifth Circuit out of the Northern District of Texas. I've looked at qualified immunity in Texas. With no disrespect for your state, Texas is the worst when it comes to qualified immunity. The Fifth Circuit, which is the Court of Appeals that hears cases that come out of Texas, is the worst Court of Appeals. You have a really, really hard road to climb when it comes to qualified immunity.

One thing they've done is allowed the courts to have their own rule, which the Supreme Court has never said is the right rule. The rule is that if a defendant argues qualified immunity or raises qualified immunity, there are heightened pleading requirements on the plaintiff at the beginning. Meaning the plaintiff has to come forward with additional facts to show exactly what happened in the case that can defeat qualified immunity. And then Texas law doesn't require law enforcement agencies to turn over any information related to these cases so long as it's part of an ongoing investigation. There's pressure on either side. The laws that the police do not have to turn over any information, and then the court says, "You have to give us detailed information about what happened before you can go forward."

[5] Joanna Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018)

There was a case brought by the family of a man named Tony Timpa out of Dallas, Texas . He was killed beneath the knee of two police officers who put their weight on him while he was handcuffed and his feet were zip-tied.[6] The officers held him down for 14 minutes until he died. This was a case in which the family couldn't know anything about what happened because he had passed away unlike, Robbie Tolan, whose family was around him. Tony Timpa had no family, and he was no longer there to tell his story. There was video footage, including body camera video, that the city of Dallas refused to turn over because there was an ongoing investigation. The lawyer and the family had to file a complaint with bare-bones information that they were able to glean from the police incident report. Then the city tried to get the case dismissed because the complaint didn't have enough information, even though the city was holding the information and refused to turn it over.

That's a rule specific to Texas, which impacts the difficulty in state law regarding qualified immunity. The judges are very sympathetic to qualified immunity, which has further effect in that lawyers are reluctant to bring these cases forward. As Chris said, lawyers have to keep the lights on. Lawyers try to bring these cases forward and invest tens of thousands of dollars of their own money because in these cases, lawyers do not get paid unless their client wins. Then, they get a portion.

They invest 10, 20, 30 thousand dollars of their own money, and then the case gets dismissed. The lawyer thinks, "You know what? I'm going to go back to my personal injury cases. I'm going to go back to my medical malpractice cases. This stuff is too hard."

I looked at lawsuit filings in the city of Houston, a city with thousands of police officers and millions of people, over a two-year period. In two years, I found 25 cases alleging police misconduct. In Philadelphia, a city of comparable size, there were 10 times as many lawsuits. In Houston, during that two-year period, there were five cases where a plaintiff recovered anything in those suits. In four of the five cases, someone had died. In the fifth, deadly force was used, but they managed not to perish. In Philadelphia, there were 10 times as many verdicts and were 100 times more awarded to plaintiffs in these cases. In the city of Houston, there was not a single person in that two-year period who recovered anything for false arrest, wrongful searches, or anything that didn't include force. That is partially because of qualified immunity, but it's also all the downstream effects, such as the fact that lawyers are concerned about bringing these cases forward. There is not a functioning system of civil rights enforcement, in my view, right now in the state of Texas because Texas state law is combined with qualified immunity.

Howard Henderson

I appreciate when you contextualize it to Texas and Houston and understanding what it looks like in relation to the national landscape.

[6] *Timpa v. Dillard*, Civil Action No. 3:16-CV-3089-N, 2020 U.S. Dist. LEXIS 118365 (N.D. Tex. 2020)(appeal filed (Aug. 27, 2020)(No. 20-10876).

Atty. Frazier Camara, one of the points that I didn't bring up was the fact that you are the chair of the American Bar Association Criminal Justice Section. Can criminal justice reform actualize without adequately addressing qualified immunity?

April Frazer Camara

I think the answer is no. Professor Schwartz brought up a really good point about enforcement. It's a myriad of issues of accountability. The focus is on police misconduct, but as someone who has clients that are kept in cages, I'm concerned about prison conditions and how people are dehumanized in general in the criminal legal system. The relief under Section 1983 has been stripped. Prison rights advocates have not been able to enforce humane conditions for people who are incarcerated. This is whether or not we are going to allow for the enforcement of civil and human rights within the criminal legal system.

I don't think we can talk about comprehensive criminal legal system reform without talking about qualified immunity. When she shared those numbers about Houston, we have to talk about how that plays into the culture within the Black community. If you live somewhere where you see rampant police misconduct, and there's never accountability, no one ever wins. You want us to have faith in this same system, but the integrity of the criminal legal system is tied to whether or not there is enforcement as well.

We need to dismantle the criminal legal system and rebuild a much smaller and humane system. But for those who have faith in the existing system, you should be concerned because how do you expect communities to have faith in a system that never protects them? They never win, and they never feel like people who are bad actors are being held responsible.

Howard Henderson

Chris, I want to piggyback off what Atty. Frazier Camara has laid out around the defund the police conversation and its role in qualified immunity being one of those spaces where we need a lot of change. From a person who is well-versed in media messaging, what role does the media's message play in our approach to qualified immunity? I mean this in terms of educating the public and understanding how we may go about making change. We've seen what social media has been able to do over the last three years in terms of galvanizing people, particularly young people, around a common message and fighting for social justice.

Can you speak to how you may suggest that the media can utilize its best practices to help reform the criminal justice system and, most notably in our case, qualified immunity?

Chris Colbert

Media plays a very large part in all of this. They're the ones that control the narrative, and depending on who they're getting their information from, it is how the public will interpret these situations going forward. From that standpoint alone, in terms of who they are deciding is giving the correct facts, how are they giving fair balance to the actual families?

I see very few times that the families are truly given a platform. Part of that is doing quick news stories that are a minute to three or five minutes long. You can't capsulate what has happened in

that amount of time. We need to take a new look at how we do our media coverage or, at least as citizens, have a realization that, "Okay, this is just introducing me to the story. I have to dig deeper somewhere else to get more." That's where I implore other media companies to do what we have done in terms of handing over our platform to the families and their advocates to talk about their perspectives.

In terms of how it then plays into qualified immunity, I think it's talking directly to the families about their experiences. For instance, Markeeta Thomas', who's also in the Houston area, brother Danny Ray Thomas, was killed in 2018. He had a manic episode in the middle of the street with his pants around his ankles and hands at his sides. There was no way he could've had a weapon. He had a mental health struggle that was all predicated on his children being killed by his wife a few months earlier. Instead of responding with somebody who could give him mental health care, they sent an officer who, within seconds of coming out of his car, shot and killed him.[7]

As Markeeta was trying to fight and get some kind of restitution, the prosecutors would come to her to get information. None of the information that she gave was presented in court. None of it – including information indicating the officer had actually threatened her brother months earlier. The officer said, "I'm going to, one day, catch you and shoot you in the back." He didn't shoot him in the back when he killed him. He shot him in his front. But at the same time, there was a threat that was never brought up in the court case. That kind of information is what the public needs to hear to understand that this system is rigged. It's set up in a way that is not going to provide restitution for these families.

And that's where the media can come into play. We have to hand our platforms over to these families and their advocates to be able to give us that other side of the story. Or, from my perspective, the real story.

Howard Henderson

We're going to close out shortly because I want to make [sic} sure we respect our time, but this conversation is so powerful.

Joanna, you lay out what you see as a prescription to change this situation. You identify certain factors that you think need to be in place to make it happen, but you also discussed in one of your articles about police training. What they're trained to do, what they're not trained to do and, and how that impacts how they interpret legislation, particularly Graham v. Connor.

If we're going to change qualified immunity in this country, what are those key elements that need to be in place? How do we get there?

Joanna Schwartz

Well, it's the big question. My point of view is that we need to end qualified immunity. Officers do not need qualified immunity. Part of the reason for that is there are so many other protections

[7] Ketterer, *Former deputy found not guilty in shooting of Danny Ray Thomas*, Houston Chronicle (Aug. 8, 2019); https://www.chron.com/news/houston-texas/houston/article/Jurors-deliberating-verdict-in-shooting-of-Danny-14291506.php.

that are already in place for law enforcement. Defenders of qualified immunity say, "We need the defense so that officers acting in good faith aren't bankrupted for split-second mistakes that they make." But the evidence shows that officers almost never pay anything in these cases. There is no danger of bankruptcy there. The Fourth Amendment, as interpreted by the Supreme Court, in the *Graham versus Connor*[8] case, which is the bedrock for police training and the Fourth Amendment, says that officers can make reasonable mistakes. They can shoot the wrong person, search the wrong person, or arrest the wrong person as long as the mistake was reasonable. I mentioned that because those decisions, those mistakes are still going to be protected by the Fourth Amendment, even if qualified immunity goes away.

There's a separate conversation that if we were to get rid of qualified immunity, should the Fourth Amendment be in the structure that it gives so much discretion and so much leeway to government decisions? I personally don't think it should, but that's the second set of conversations.

If qualified immunity goes away, it means that the cost, burdens, and complications of litigating these cases are going to get lower. It means that more lawyers will probably be willing to take these cases. It means that when these cases are filed, the focus is going to be on what the officers did in terms of whether they violated the Constitution. Not whether someone can find a prior court decision. The focus will be on what the officers actually did, and that's really important.

There are going to be more decisions that are issued by courts that explain what the Constitution requires. Right now, there's a lot of decisions that grant qualified immunity but don't explain whether the law was violated. To the extent that police departments want to train their officers about the law, qualified immunity makes it harder to even understand what the law is. There are a lot of important things that ending qualified immunity will do, but it is not a cure-all.

In connecting to Ms. Frazier Camara's comment in the beginning, ending qualified immunity is a very important piece of the puzzle. Qualified immunity is a manifestation of racism in the criminal justice system and abuse of power in the system. But ending qualified immunity on its own is not going to end everything. There is still that backdrop. It's the most important first step that a state legislature, Congress, or the Supreme Court could take. But there is a lot more to be done in terms of training in the way we think about what the police's role is in our society and how we think about investigating and supervising the officers that we do have.

It's one piece, but it's an important piece.

Howard Henderson

Atty. Frazier Camara, what's step number two? Where do we go from here?

Because oftentimes, we have panel discussions, and we pontificate about a problem, but you're very solutions-oriented.

[8] *Graham v. Connor*, 490 U.S. 386 (1989)

I've watched the work that you all do, and you focus on addressing problems with solutions that make a difference and are racially equitable. In the recent piece we put out on Saving Black Lives as a collaborative effort, we talked about the fact that race neutrality doesn't necessarily exist.

From your perspective, what should step two be?

April Frazer Camara

We have to have a very serious conversation in America about reparations. We have to do something to right the wrongs of the past. When we talk about all of the cases, all of the harm that has been done to Black, Brown, and un-resourced communities, it's one thing to repeal or change qualified immunity, but what happens to Markeeta?

My uncle died in jail, and, fortunately, we got a settlement. But what do you do to repair the harm that you have done for centuries to Brown and Black communities through the defense of qualified immunity? Reparations have to be a part of the conversation.

Let me just say this about where we are as a country: There is a need for us to focus on unity and how we move forward, but you cannot unify a country until you confront and address the harm that has been done. That's why we have to talk about reparations, and we have to talk about how do we offer restitution to people who have been harmed by the system.

Howard Henderson

That's a good point and one that we oftentimes are afraid to have conversations about.

Chris, I'll give you the final word before we close. We're on the campus that has a historical law school, Thurgood Marshall School of Law. We also have the Barbara Jordan - Mickey Leland School of Public Affairs, and we have the School of Communication. We are located in the heart of Houston, Texas, and in the belly of the Fifth Circuit. From your perspective as a media person, what can be done to make sure we help this Fifth Circuit move in the right direction?

Chris Colbert

There are a lot of steps. There's not going to be a one-size-fit-all for any of this. Accountability is something that is big, and in the grand scheme of things, I think a public database that allows us to see the records of police officers and their history is key.

As it's been touched on before, there tends to be a pattern of escalation where officers see they can get away with things. Then, eventually, someone dies, or they actually kill somebody. They do that over and over again. But, they may be moved around to different regions. A public database will help us hold our public officials' feet to the fire around these things.

It also can help us combat qualified immunity. I'm not a lawyer, so I don't know this for certain, but a database can allow us to see, "Oh, this person has a history of claiming they feared for their life. Well, there's a pattern that shows they're going after specific people and harming them in different ways so that qualified immunity doesn't apply here."

Specific to Houston and the Fifth Circuit, it is a situation that is rigged against communities of color. From a media standpoint, we have to tell these in-depth stories of these individuals. I hate to bring up the same thing again, but in terms of what the media can do, they have to make sure that they're giving an opportunity to the lawyers, like yourselves, and these families to talk about what it is that they're up against. Or how they have been re-victimized in this process so that the world can understand, "Okay, this is a specific area that needs addressing." Houston specifically has an issue that needs to be addressed.

Howard Henderson

Professor Schwartz, Atty. Frazier Camara, and Chris Colbert, you have given us something to take with us to develop an action plan, which is very powerful. We understand that it's going to take unique conversations, and it's going to take collaborative efforts from folks like you all, so we appreciate you.

Larry Taylor

Wait, Howard. I do appreciate staying on time. Right now, we're going to open it up for some questions and answers from the attendees to the panelists.

Professor, you were absolutely correct – practicing civil rights in the state of Texas is a tremendous uphill battle. One of the things I'd like to mention is qualified immunity doesn't necessarily just stay within criminal law or criminal activity. You also have activities, like in Breonna Taylor's case, that involve someone who is a bystander of a criminal investigation, or some kind of criminal activity, that is injured but also prohibited from getting justice because of this qualified immunity. The Texas Supreme Court has written an opinion that has basically shut the door on an opportunity for that type of justice to come forth. I just wanted to make sure that I put that out there.

The first question we have is, "What kind of pressure can we put on the city hall officials to address these issues? I live in Dallas. We have a new police chief and are in a city council that is majority African-American." Great discussion. Howard let's go ahead and get you involved. What do you think, my friend?

Howard Henderson

First of all, I'm a Ph.D. in criminal justice. I would be foolish if I wanted to take a stab at that, but I will say this: I think the best thing to do is to link up with experts like Atty. Frazier Camara, Professor Schwartz, and Chris Colbert. We need to be able to identify the problem but also keep highlighting the individuals that are engaged in this process. People don't know who's on the city council, so they can't hold people accountable. They don't know who they are, and there's no light being shed on these people who are making critical decisions at a very local level. We tend to think about a lot of these issues from a federal standpoint, but the reality of it is 80% of our criminal justice system is a local issue. We need to begin to look at it from that standpoint, but I open that up to the experts on the panel.

Larry Taylor

I was just going to say that being here at Texas Southern as a graduate of our law school, there this movement of reforms taking place. Dr. Henderson talked about the importance of collaboration, but the community should be driving what the solutions are. That means making sure you tap into the expertise of legal experts and media because we have to be aligned with what the community sees as the solution. I think it's a great question, and for people who study these issues academically, such as public defenders and people who work in the system, you can't be moving these reforms if you're not in alignment with the community. The power is in our communities and in the work that Chris is doing to elevate the voices. Even as public defenders, we should not be the voice. It's the voice of directly impacted people. Any effort should be driven by the community, and experts should only be coming in to advise, not to lead the movement.

Thank you. Dr. Schwartz, someone asked if you could define qualified immunity one more time.

Joanna Schwartz

Sure, I know it's hard to understand. It sort of makes your head spin when you actually hear it.

The Supreme Court created it, and it says that officers have qualified immunity unless they violated clearly established law. The way that they've defined clearly established law is that it can't be defined at a state of generality like the standard for *Graham v. Connor*.[9] It has to be specific, particularized to the facts before them. So what it comes to mean in practice is that a plaintiff has to find a prior court decision where a court held that an officer acted unconstitutionally, and the way in which that officer acted is factually very similar to the case at hand.

Larry Taylor

Thank you, Professor. One of the attendees asked, and I'll go ahead and answer this one, "How can we keep in contact or find more information out about the speakers?"

If you take a look on your screens, you can go down to the schedule, and at this particular event, there is a section where you can actually click on the speakers. Their information will pull up their bios, emails, and any social media they may have. That information is available to you on the actual platform itself.

Next question, and Chris, I'll throw this one at you. The question is, "The police body cameras, what kind of effect have they had on changing or addressing this issue?"

Chris Colbert

I think all footage is good. It gives us more to work with, but unfortunately, we're seeing that that is not making a full difference either. We're still up against the qualified immunity aspect of, "Did you fear for your life?" and you can't see that on the video. We can, but in the court of law, we still cannot prove what is in someone's mind. The video doesn't show what is in someone's mind, so as much as those videos help – and we should continue to push to make sure we have those body cameras – it's not always applied in a way that helps us against qualified immunity.

[9] *Id.*

That being said, we still need to push to make sure there are requirements for all officers. Not every police department makes it a requirement. Just looking at LA, LA's police department and LA's sheriff department have different requirements in terms of utilizing body cams. The sheriff's department doesn't have to, whereas the police department has a higher rate of having to use them. Also, there's ensuring that they're on at all times. We're seeing a lot now where the body cams are turned on after the shooting happens or after the assault happens. Yes, it's great that you get some of that back time, but you get no audio. You can't see what that verbal communication back and forth between the officer and the victim was. So, they can claim that they gave all these warnings, but there's no audio to support it. We still have to set up systems and make sure they are used properly.

Just to pivot real quick to the last question I answered in terms of the media's responsibility, one other aspect that I didn't mention because we were really focusing on qualified immunity is that it's the media's responsibility to also tell the story of these individuals. Who were they as human beings? We continue to look at them as hashtags and statistics, and that does a disservice to them and their families. We hold police at such high stature, so when we see these victims who are killed, many times, the media will run with a mugshot or run with some kind of football picture that vilifies them or makes them look more aggressive than maybe they really were. I know from talking to the families that they have not been consulted about what photo to use for their loved one. They've never been asked if they have a picture for them or ask who this human being is, so they're not just seen as a statistic or as a villain if they were not. That's the other piece for media – we need to tell the actual stories of these human beings and memorialize them so we can get behind them. They are humans, just like our brothers, sisters, mothers, and fathers. I just wanted to make sure I added that piece in as well.

Larry Taylor

I'm going to try to leave us with some hope that things are actually moving forward. Professor, could you tell us of any success stories with legislation that is moving qualified immunity forward?

Howard Henderson

Absolutely. There are states across the country that are introducing and considering bills that would create a right to sue under the state constitution without qualified immunity as a defense. Texas is considering that kind of bill right now, and I hope that it gets passed.

In June of 2020, Colorado passed an exciting statute.[10] You could look it up. It's Senate Bill 217 in Colorado, and it creates the right to sue for violation of the state constitution with no qualified immunity as a defense. There's a couple of other things that it does to support really important parts of the process, such as it provides for attorney's fees for people who bring these state law claims. It also requires that the city pays for the settlement and judgment in any case unless the officer was convicted of a crime. I disagree with that part, but I'll take it in general. The statute also says that if the city finds that their officer has acted in bad faith, they will require the officer

[10] Colorado Revised Statutes, § 13-21-131.

to pay up to $25,000 or 5% of the settlement or judgment, whichever is less. If they can't pay that amount, then the city will cover that rest. I think that that's a really exciting portion as well.

It creates some financial responsibility for the officer, but it doesn't leave the person whose rights have been violated without compensation. In my mind, making sure that people whose rights have been violated get some form of compensation, which will never be enough to make them fully whole, is a really important first step. Colorado's statute is a model for us for the future, in terms of state law with no qualified immunity, attorney's fees, required indemnification, and a financial sanction for officers.

Larry, I wanted to highlight New York City Council is actually considering a bill to create a reparations fund for victims of police misconduct. A lot of great movement is taking place at the local and state level. I would tell people to be creative and not be weighted to a narrow fix. We have to be creative in figuring out strategies to not only correct behavior moving forward but addressing how we restore people who have been wronged in the past.

Larry Taylor

I can just piggyback off of both of those, I don't know if everybody in the audience understands this, but when you see settlements that happen for these families, that money is coming from taxpayers' money. That's not coming from the police departments. That's not coming from the officer themselves. As Professor Schwartz mentioned before, it's great what Colorado is doing because once you start hitting people in their pockets, that's when change begins to happen. I just wanted to make sure people understood that right now, you are paying to help these families.

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The Case Against Qualified Immunity

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THE CASE AGAINST QUALIFIED IMMUNITY

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INTRODUCTION

In many ways, qualified immunity's shield against government damages liability is stronger than ever. The United States Supreme Court has made clear that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law."[1] The Court dedicates an outsized portion of its docket to reviewing—and virtually always reversing—denials of qualified immunity in the lower courts.[2] In these decisions, the Court regularly chides courts for denying qualified immunity motions given the importance of the doctrine "to society as a whole."[3] And the Court's recent qualified immunity decisions make it seem nearly impossible to find clearly established law that would defeat the defense.[4]

But there are also cracks in qualified immunity's armor. Most recently, in his concurrence in *Ziglar v. Abbasi*, Justice Thomas criticized the doctrine for bearing little resemblance to the common law at the time the Civil Rights Act of 1871 became law, and for being defined by "precisely the sort of 'free-wheeling policy choice[s]' that we have previously disclaimed the power to make."[5] Indeed, Justice Thomas recommended that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."[6] Much attention has been paid to Justice Thomas's call to reconsider qualified immunity doctrine in *Ziglar*.[7] But Justices have been raising questions about

1 Malley v. Briggs, 475 U.S. 335, 341 (1986).

2 *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82 (2018) (observing that the Supreme Court has decided thirty qualified immunity cases since 1982, and has found that defendants violated clearly established law in just two of those cases). The Court's recent decisions in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), puts the count at thirty-two. Twenty of those decisions have been issued within the past ten years. If one includes cases in which qualified immunity is invoked less directly, the count would be higher. *See, e.g.*, Tolan v. Cotton, 134 S. Ct. 1861 (2014); Scott v. Harris, 550 U.S. 372 (2007).

3 *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 551–52 (2017) ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.' Today it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" (first quoting City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015); then quoting Pearson v. Callahan, 555 U.S. 233, 231 (2009))); *Sheehan*, 135 S. Ct. at 1774 n.3 ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982))).

4 *See infra* notes 109–12 and accompanying text (describing the Court's recent qualified immunity decisions).

5 Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (alteration in original) (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

6 *Id.* at 1872.

7 *See, e.g.*, Will Baude, *"In an Appropriate Case, We Should Reconsider Our Qualified Immunity Jurisprudence,"* WASH. POST: THE VOLOKH CONSPIRACY (June 19, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/in-an-appropriate-case-

qualified immunity for decades. In 1997, Justice Breyer suggested that defendants should not be protected by qualified immunity if they are certain to be shielded from financial liability by their employer.[8] In 1992, Justice Kennedy indicated that qualified immunity doctrine might be unnecessary to shield government defendants from trial given the Court's summary judgment jurisprudence.[9] In 2015, and again in 2018, Justice Sotomayor expressed concern that the Court's qualified immunity decisions contribute to a culture of police violence.[10]

If the Court did find an appropriate case to reconsider qualified immunity, and took seriously available evidence about qualified immunity's historical precedents and current operation, the Court could not justify the continued existence of the doctrine in its current form. Ample evidence undermines the purported common-law foundations for qualified immunity.[11] Research examining contemporary civil rights litigation against state and local law enforcement shows that qualified immunity also fails to achieve its intended policy aims. Qualified immunity does not shield individual

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we-should-reconsider-our-qualified-immunity-jurisprudence/?utm_term=.18443bf27fbd (describing Justice Thomas's concurrence as offering "some promising skepticism . . . about the doctrine of qualified immunity"); Matt Ford, *American Policing Goes to the Supreme Court*, ATLANTIC (Oct. 1, 2017), https://www.theatlantic.com/politics/archive/2017/10/supreme-court-carpenter-cases/541524/ (describing Justice Thomas's concurrence as "a glimmer of light . . . for qualified-immunity critics"); Perry Grossman, *Clarence Thomas to the Rescue?*, SLATE (June 21, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/in_ziglar_v_abbasi_clarence_thomas_signals_his_support_for_civil_rights.html (describing Justice Thomas's concurrence as "the most direct call for change [of qualified immunity doctrine] to date").

8 *See* Richardson v. McKnight, 521 U.S. 399, 411 (1997) (concluding that private prison guards are not entitled to qualified immunity in part because "insurance increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face").

9 *See* Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) ("*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. However, subsequent clarifications to summary-judgment law have alleviated that problem . . . ." (citations omitted)).

10 *See* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) ("When Mullenix confronted his superior officer after the shooting, his first words were, 'How's that for proactive?' . . . [T]he comment seems to me revealing of the culture this Court's decision supports when it calls it reasonable—or even reasonably reasonable—to use deadly force for no discernible gain and over a supervisor's express order to 'stand by.' By sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."); *see also* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that the Supreme Court's decision reversing the Ninth Circuit's denial of qualified immunity for an officer who shot a woman holding a knife "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished").

11 *See infra* Part I for further discussion of this argument.

officers from financial liability.[12] It almost never shields government officials from costs and burdens associated with discovery and trial in filed cases.[13] And it appears unnecessary to encourage vigorous enforcement of the law.[14]

The Court could, alternatively, overhaul or eliminate qualified immunity because—as Justice Sotomayor has observed—its application all too often "renders the protections of the Fourth Amendment hollow."[15] Although few cases are dismissed on qualified immunity grounds, multiple aspects of the doctrine—including its disregard of officers' bad faith, exacting requirements to clearly establish the law, and license to courts to grant qualified immunity without ruling on the underlying constitutional claims—hamper the development of constitutional law and may send the message that officers can disregard the law without consequence. The fact that qualified immunity doctrine fails to protect government officials from financial liability or other burdens of suit makes the doctrine's imbalance between government and individual interests especially concerning and unwarranted.

If a majority of the Court is convinced by one or more of these arguments, they should restrict or do away with the qualified immunity defense altogether. In fact, five of the Justices currently on the Court have authored or joined opinions expressing sympathy with one or more of these arguments.[16] Why, then, has the Court continued so vigorously to apply the doctrine, often in unanimous or per curiam decisions? In my view, the most likely explanation is that Justices fear eliminating or restricting qualified immunity would alter the nature and scope of policing or constitutional litigation in ways that would harm government officials and society more generally.[17] For reasons that I will describe elsewhere, I believe there would be no parade of horribles were qualified immunity eliminated.[18] But even if the Court does not find my assurances to be convincing, unsubstantiated fears about the future are insufficient reason to maintain a doctrine unmoored to common-law principles, unable or unnecessary to achieve the Court's policy goals, and unduly deferential to government interests. The Justices can end qualified immunity in a single decision, and they should end it now.

12 *See infra* Section II.A for further discussion of this argument.

13 *See infra* Section II.B for further discussion of this argument.

14 *See infra* Section II.C for further discussion of this argument.

15 *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting); *see infra* Part III for further discussion of this argument.

16 *See supra* notes 5, 8–10 and accompanying text (describing Justice Thomas's concurrence in *Ziglar*, Justice Breyer's opinion in *Richardson* (which was joined by Justice Ginsburg), Justice Kennedy's concurrence in *Wyatt*, Justice Sotomayor's dissent in *Mullenix*, and Justice Sotomayor's dissent in *Kisela* (which was joined by Justice Ginsburg)).

17 For some alternative explanations for the Court's behavior, see *infra* notes 220–23 and accompanying text.

18 *See* Joanna C. Schwartz, After Qualified Immunity (unpublished manuscript) (draft on file with author).

I. Qualified Immunity Has No Basis in the Common Law

Qualified immunity shields executive branch officials from damages liability, even when they have violated the Constitution, if they have not violated "clearly established law."[19] The Supreme Court first announced that executive officers were entitled to qualified immunity in 1967.[20] In that decision, *Pierson v. Ray*, the Court described qualified immunity as grounded in common-law defenses of good faith and probable cause that were available for state-law false arrest and imprisonment claims.[21] The Court in *Pierson* appeared to focus on common-law defenses available in Mississippi at the time the case was filed.[22] But, in subsequent cases, the Court has repeatedly explained that qualified immunity is drawn from common-law defenses that were in effect in 1871, when Section 1983 became law.[23]

Despite the Court's repeated invocation of the common law, several scholars have shown that history does not support the Court's claims about qualified immunity's common-law foundations. When the Civil Rights Act of 1871 was passed, government officials could not assert a good faith defense to liability.[24] A government official found liable could petition for indemnification and thereby escape financial liability.[25] But if a government official engaged in illegal conduct he was liable without regard to his subjective good faith.[26] Indeed, the Supreme Court expressly rejected a good faith defense

19 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

20 *See* Pierson v. Ray, 386 U.S. 547 (1967).

21 *Id.* at 556–57 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

22 *See id.* at 555 (making clear that the good faith defense that the court of appeals recognized, and the Court extended to Section 1983 claims, was drawn from a "limited privilege under the common law of Mississippi").

23 *See* Baude, *supra* note 2, at 53–54; *see also* Filarsky v. Delia, 566 U.S. 377, 383 (2012) ("Our decisions have recognized similar immunities under § 1983, reasoning that common law protections 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983." (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))); Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (asking whether immunities "were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them" (quoting *Pierson*, 386 U.S. at 555)); Malley v. Briggs, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.").

24 *See* James E. Pfander, Constitutional Torts and the War on Terror 16–17 (2017); *see also* Baude, *supra* note 2, at 55; David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14–21 (1972); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 414–22 (1987).

25 *See* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1924 (2010).

26 *See* Baude, *supra* note 2, at 56; *see also* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 Ohio St. J. Crim. L. 463, 465 (2010).

to liability under Section 1983 after it became law.[27] The Court's conclusion in *Pierson* that a good faith immunity protected the defendant officers from liability is simply "inconsistent with the common law and many of the Court's own decisions."[28]

Moreover, even if one believed that the Court's decision in *Pierson* accurately reflected the common law, today's qualified immunity doctrine bears little resemblance to the protections announced in *Pierson*. Although qualified immunity was initially available to government officials who acted with a subjective, good faith belief that their conduct was lawful, the Supreme Court, in *Harlow v. Fitzgerald*, eliminated consideration of officers' subjective intent and focused instead on whether officers' conduct was objectively unreasonable.[29] Even when a plaintiff can demonstrate that a defendant was acting in bad faith, that evidence is considered irrelevant to the qualified immunity analysis.[30] The Court has repeatedly made clear that a plaintiff seeking to show that an officer's conduct was objectively unreasonable must find binding precedent or a consensus of cases so factually similar that every officer would know that their conduct was unlawful.[31] Defendants are entitled to interlocutory appeals of qualified immunity denials.[32] And qualified immunity applies to all types of constitutional claims, not only claims for which an officer's good faith might otherwise be relevant.[33] None of these aspects of qualified immunity can be found in the common law when Section 1983 became law, or in *Pierson*.

To its credit, the Supreme Court has long recognized that it cannot ground its qualified immunity jurisprudence in the common law. Indeed, thirty years ago, the Supreme Court acknowledged that it had "completely reformulated qualified immunity along principles not at all embodied in the common law."[34] The Court reformulated qualified immunity with a specific goal in mind—to shield government officials against various harms associated with insubstantial lawsuits.[35] In the next Part, I will show that qualified immunity is neither necessary nor particularly well suited to achieve this goal. But Justice Thomas has recently raised a more fundamental critique of the Court's turn away from the common law.

In his concurrence in *Ziglar v. Abbasi*, Justice Thomas writes that qualified immunity should conform to the "common-law backdrop against which

27 *See* Baude, *supra* note 2, at 57 (describing Myers v. Anderson, 238 U.S. 368 (1915)).

28 Alschuler, *supra* note 26, at 504; *see also* Woolhandler, *supra* note 24, at 464 n.375.

29 *See* Alschuler, *supra* note 26, at 506 ("A justice who favored giving § 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*.").

30 *See, e.g.*, *infra* note 126 and accompanying text (describing the Supreme Court's decision in *Mullenix v. Luna*).

31 *See infra* notes 111–12 and accompanying text (describing these decisions).

32 *See* Mitchell v. Forsyth, 472 U.S. 511, 526–27 (1985).

33 *See* Baude, *supra* note 2, at 60–61 (describing this as a "mismatch problem").

34 Anderson v. Creighton, 483 U.S. 635, 645 (1987).

35 *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); *see also* Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

Congress enacted the 1871 Act," rather than "the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make."[36] If four other Justices share Justice Thomas's view, then they could vote to limit qualified immunity to those defenses available at common law in 1871.[37] As the discussion in this Part makes clear, conforming qualified immunity doctrine to the common law in place in 1871 would require dramatically limiting qualified immunity doctrine or doing away with the defense altogether. On the other hand, if five or more Justices do not mind that qualified immunity doctrine currently takes a form far different than the common law in 1871, and do not mind that the doctrine has been structured by the Court to advance its interest in shielding government officials from burdens associated with being sued, then it becomes important to consider the extent to which the doctrine achieves its policy goals. I turn to this topic next.

II. Qualified Immunity Does Not Achieve Its Intended Policy Goals

When the Court created qualified immunity in 1967, it explained that the doctrine would protect government officials acting in good faith from financial liability.[38] Fifteen years later, the Court expanded the list of government interests advanced by qualified immunity to include protection against "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[39] In its most recent decisions, the Court focuses primarily on qualified immunity's presumed ability to shield government officials from burdens associated with discovery and trial.[40] The Court claims that qualified immunity achieves these policy goals, but has offered no evidence to support this claim.[41] Instead, all available evidence undermines each of the Court's policy justifications for the doctrine.

I have examined the extent to which qualified immunity doctrine serves its policy goals in lawsuits filed against state and local law enforcement. I

36 Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (alteration in original) (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

37 Justice Kennedy has raised similar concerns, observing that because qualified immunity was drawn from common-law defenses available when Section 1983 was enacted, "[t]hat suggests . . . that we may not transform what existed at common law based on our notions of policy or efficiency." *Wyatt*, 504 U.S. at 171–72 (Kennedy, J., concurring).

38 *See generally* Pierson v. Ray, 386 U.S. 547 (1967); *see also infra* notes 44–45 and accompanying text.

39 *Harlow*, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

40 *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 15 (2017) (describing these decisions).

41 *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal." (quoting *Harlow*, 457 U.S. at 818)).

have found, contrary to the Court's assertions, that qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments entered against them. I have additionally found that qualified immunity is unnecessary and ill-suited to shield government officials from burdens of discovery and trial, as it is very rarely the reason that suits against law enforcement officers are dismissed. Finally, available evidence suggests that the threat of being sued does not play a meaningful role in job application decisions or officers' decisions on the street.

It could be that different types of government actors have different rules on indemnification or that litigation against these actors is resolved in different ways. But this possibility does not weaken the case against qualified immunity. Law enforcement is a common defendant in Section 1983 cases, and cases involving law enforcement have played a significant role in the development of the Supreme Court's qualified immunity jurisprudence.[42] Moreover, given available evidence of qualified immunity's failure to achieve its intended policy goals, the burden should now rest on other types of government officials to show how they are different.[43]

A. Qualified Immunity Does Not Shield Officers from Financial Burdens

Qualified immunity has long been justified as a shield from financial liability. As the Court explained in *Pierson*, qualified immunity was necessary because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[44] The fear of damages liability has repeatedly been invoked by the Court as justification for qualified immunity.[45] But my research has shown that state and local law

42 *See* Baude, *supra* note 2, at 88–90 (showing that thirteen of the Supreme Court's thirty qualified immunity cases since 1982 have involved state or local law enforcement defendants). The Supreme Court's 2018 decisions in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), and *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), also involved local law enforcement defendants. Accordingly, fifteen of the Court's thirty-two qualified immunity decisions have considered the propriety of qualified immunity for state or local law enforcement defendants. Another seven cases have involved federal law enforcement officers.

43 I disagree with the view that the methodological limitations of these studies—including their focus on law enforcement defendants—necessitate further research "[b]efore calling for a blanket elimination of qualified immunity." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1878 (2018). Although empirical studies will always have methodological limitations and there will always be additional empirical questions that can be posed and answered, all available evidence supports the conclusion that qualified immunity doctrine does not achieve its intended policy objectives. The burden should now shift to skeptics to unearth convincing evidence that supports a contrary conclusion.

44 Pierson v. Ray, 386 U.S. 547, 555 (1967).

45 *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("Special problems arise . . . when government officials are exposed to liability for damages. To the extent that the

enforcement officers should have no fear of being mulcted in damages. A combination of state laws, local policies, and litigation dynamics ensures that officers are virtually never required to pay anything toward settlements and judgments entered against them.

In a prior study, I gathered information from eighty-one state and local law enforcement agencies—including forty-four of the nation's largest agencies and thirty-seven smaller agencies—regarding the total number of damages actions naming an individual officer that resulted in a payment to a plaintiff over a six-year period, the amount paid to plaintiffs in these cases, the number of instances in which an individual officer contributed to a payment, and the amount the officer(s) contributed.[46] I found that officers employed by these eighty-one jurisdictions virtually never contributed to settlements and judgments during the six-year study period.[47] I additionally concluded, based on correspondence with government officials in the course of my research, that law enforcement officers almost never pay for defense counsel—instead, counsel is provided by the municipality, the municipal insurer, or the union.[48]

Among the forty-four largest agencies in my study, 9225 cases were resolved with payments to plaintiffs, and plaintiffs were paid more than $735 million in these cases.[49] But individual officers contributed to settlements in just 0.41% of these cases, and paid approximately 0.02% of the total awards to plaintiffs.[50] Although punitive damages are specifically intended to punish defendants who act with "evil motive or intent," or "reckless or callous indifference to the federally protected rights of others,"[51] officers did not pay a penny of the more than $9.3 million that juries awarded in punitive damages during the study period.[52] Indeed, I found multiple instances in which

threat of liability encourages these officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should. By its nature, however, the threat of liability can create perverse incentives that operate to *inhibit* officials in the proper performance of their duties."); Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (reporting that "public officers require [some form of immunity protection] to shield them from undue interference with their duties and from potentially disabling threats of liability"). This fear was also invoked by Justice Gorsuch when he was on the Tenth Circuit. *See* Cortez v. McCauley, 478 F.3d 1108, 1141 (10th Cir. 2007) (en banc) (Gorsuch, J., concurring in part and dissenting in part) ("The qualified immunity doctrine . . . is intended to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages . . . . Before a law enforcement officer may be held financially liable, the Supreme Court requires a plaintiff to establish not only that his or her rights were violated but also that those rights were [clearly established].").

46 For additional information about the jurisdictions, my methodology, and my findings, see Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 902–12 (2014).

47 *See generally id.*

48 *Id.* at 915–16.

49 *Id.* at 890.

50 *Id.*

51 Smith v. Wade, 461 U.S. 30, 56 (1983).

52 Schwartz, *supra* note 46, at 917–18.

government attorneys used evidence about officers' limited financial resources in efforts to reduce punitive damages awards after trial—arguments that suggested officers would be personally responsible for satisfying those awards—only to indemnify the officers after courts entered final judgments in the cases.[53] And on the rare occasions that officers did contribute to settlements or judgments, their contributions were modest: no officer paid more than $25,000, and the median contribution by an officer was $2250.[54] No more than five of the forty-four largest jurisdictions in my study required officers to contribute anything during the six-year study period, and none of the thirty-seven smaller jurisdictions in my study required officers to do so.[55] In the vast majority of jurisdictions, "officers are more likely to be struck by lightning" than to contribute to a settlement or judgment over the course of their career.[56]

Although officers virtually never contribute to settlements and judgments, different mechanisms protect officers from financial liability around the country. Some jurisdictions must indemnify officers for actions taken in the course and scope of their employment as a matter of law.[57] Some jurisdictions can indemnify officers, but are not required to do so.[58] And some jurisdictions prohibit indemnification of officers under any circumstance.[59] Yet these policy variations do not lead to variation in outcome—regardless of the underlying policies, officers virtually never pay.[60] Cities and counties follow state laws requiring indemnification when they exist. When indemnification is discretionary, cities and counties virtually always decide to indemnify officers. And when cities and counties prohibit indemnification, some government officials view that prohibition as relevant only to the satisfaction of judgments and agree to pay settlements to resolve claims against their officers.[61] Other jurisdictions appear to indemnify their officers in violation of governing law.[62]

Even on the rare occasions that governments refuse to indemnify their officers, officers virtually never end up paying anything from their own pockets for a variety of reasons. When a city declines to indemnify an officer, the plaintiff may proceed against the municipality instead.[63] Some plaintiffs

53 *See id.* at 933–36.
54 *Id.* at 939.
55 *Id.* at 960.
56 *Id.* at 914.
57 *See id.* at 905 n.93.
58 *See id.* at 906 n.94.
59 *See id.* at 906 n.95.
60 *See id.* at 919.
61 *See id.*
62 *See id.* at 919–23.
63 I learned of one such example in interviews conducted for a related project. *See* Telephone Interview with E.D. Pa. Attorney A at 10 (on file with author) (describing a police shooting case in which the city of Philadelphia declined to indemnify the officer, and the attorney proceeded against the City: "[H]e's completely judgment proof. He can't even hold a job, he worked for a couple of months at Home Depot and he got fired. And,

decide not to try to collect judgments against officers who are not indemnified—presumably because the officers have limited personal assets.[64] Plaintiffs sometimes agree not to enforce their judgments against officers in exchange for post-trial settlements with the government.[65] Plaintiffs sometimes challenge the government's decision not to indemnify, but do not subsequently seek to collect against the officer if they are unsuccessful.[66] Other officers have successfully challenged their employers' decision not to indemnify; in these cases the plaintiffs were ultimately paid by the jurisdictions.[67] An officer denied indemnification may assign his right to challenge the city's decision to the plaintiff in exchange for an agreement not to enforce the judgment against the officer.[68] And in two recent cases, the City of Cleveland denied officers indemnification for multimillion-dollar verdicts, then hired bankruptcy attorneys for the officers to discharge the debts.[69] In each of these cases, officer defendants, their government employers, and plaintiffs have responded differently to government decisions not to indemnify. But the result in each of these cases was the same—the individual officers did not pay.

The Supreme Court has suggested, in another context, that qualified immunity is unnecessary to protect defendants who are otherwise insulated from financial liability. In *Richardson v. McKnight*, the Court denied private prison guards qualified immunity in part because, Justice Breyer wrote, private employment "increases the likelihood of employee indemnification and

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you know, I was left in a position where I had a pretty good case against him on the police shooting, but it would have been futile. I didn't want to take a verdict against him. I didn't want to take any damages against him. So . . . I'm proceeding against the municipality and we'll see how that goes.").

64 *See* Schwartz, *supra* note 46, at 929.

65 *See id.* at 921–22. I recently interviewed an attorney who described a case in which this type of negotiation occurred after trial. *See* Telephone Interview with N.D. Ohio Attorney C at 8 (on file with author) (describing a case in which the jury awarded $200,000 in compensatory damages and $450,000 in punitive damages against an officer; the city said that it would not indemnify the officer's punitive damages award; the defendants appealed the verdict; and the parties agreed to settle the case for $200,000 plus attorneys' fees, paid for by the city, in exchange for the defendants' agreement to withdraw the appeal).

66 *See* Schwartz, *supra* note 46, at 931. I recently interviewed an attorney who reported that, after he won a jury verdict against a Philadelphia police officer and the city declined to indemnify the officer, the attorney represented the police officer in a case against the city, seeking indemnification. *See* Telephone Interview with E.D. Pa. Attorney D at 8 (on file with author). The attorney lost in the state appellate court. *See id.*

67 *See* Schwartz, *supra* note 46, at 930–31.

68 *See id.* at 929.

69 *See* Radley Balko, *Cleveland's Vile, Embarrassing Scheme to Avoid Paying Victims of Police Abuse*, WASH. POST (Jan. 20, 2016), https://www.washingtonpost.com/news/the-watch/wp/2016/01/20/clevelands-vile-embarrassing-scheme-to-avoid-paying-victims-of-police-abuse/?utm_term=.a874f9fc1c31; Kyle Swenson, *How Cleveland's Trying to Get Out of Paying $18.7 Million in Judgments Against Two Cleveland Police Officers*, CLEVELAND SCENE (Jan. 13, 2016), https://www.clevescene.com/cleveland/how-clevelands-trying-to-get-out-of-paying-187-million-in-judgments-against-two-cleveland-police-officers/Content?oid=4692049.

to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face."[70] Likewise, the Court in *Owen v. City of Independence* held that municipalities are not entitled to qualified immunity in part because concerns about the "injustice . . . of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion" are "simply not implicated when the damages award comes not from the official's pocket, but from the public treasury."[71]

State and local law enforcement officers are as insulated from the threat of financial liability as are private prison guards, and as are individual officers in claims against the government. There should be no concerns about the injustice of subjecting state and local law enforcement officers to financial liability because the money to satisfy those awards comes from the public treasury. To the extent that Justice Breyer (who authored *Richardson*) or any other Justice views qualified immunity as a doctrine justified by the need to shield government officials from the threat of financial liability,[72] evidence that law enforcement officers virtually never contribute anything to settlements and judgments entered against them demonstrates that qualified immunity does not—and need not—serve this policy goal. And there is no evidence to suggest that other types of government officials face financial liability more frequently.

B. Qualified Immunity Does Not Shield Officers from Burdens of Litigation in Filed Cases

The Court has also justified qualified immunity as a protection from the burdens of discovery and trial in "insubstantial" cases.[73] In *Harlow*, the Court explained that the resolution of constitutional clams "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," and that "[i]nquiries of this kind can be peculiarly disruptive of effective government."[74] The Court appears to have become increasingly committed to this justification for qualified immunity doctrine. In 1992, the Court wrote that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity."[75] But, by 2009, the Court reversed course, explaining that "the 'driving force' behind creation of the qualified immu-

70 Richardson v. McKnight, 521 U.S. 399, 411 (1997).

71 Owen v. City of Independence, 445 U.S. 622, 654 (1980).

72 It is unclear how strongly Justices currently on the Court hold this view. In *Sheehan*, Justice Alito's decision for the Court noted in passing that the likelihood that the officer defendants in the case would be indemnified was irrelevant to their qualified immunity analysis. *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) ("Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution.").

73 Harlow v. Fitzgerald, 457 U.S. 800, 815–17 (1982).

74 *Id.* at 817.

75 *Richardson*, 521 U.S. at 411.

nity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'"[76]

If the "driving force" behind qualified immunity is to resolve insubstantial claims before discovery, the doctrine is utterly miserable at achieving its goal. In a prior study, I reviewed the dockets of 1183 Section 1983 lawsuits filed against law enforcement officers and agencies over a two-year period in five federal districts.[77] I found that just seven of these 1183 cases (0.6%) were dismissed on qualified immunity grounds before discovery.[78] Qualified immunity is little better at shielding government officials from trial—just thirty-eight (3.2%) of the 1183 cases in my dataset were dismissed before trial on qualified immunity grounds.[79] Although I do not know how many of these 1183 cases the Court would consider "insubstantial,"[80] the Court has explained that it intends qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law."[81] Unless the vast majority of law enforcement officer defendants are "plainly incompetent" or "knowingly violate the law," the doctrine is not functioning as expected in filed cases.[82]

My data suggest that qualified immunity screens out so few filed cases before discovery and trial because it is, in many ways, poorly designed to achieve its goal. First, qualified immunity cannot be raised by municipalities, and cannot be raised by government defendants in cases seeking solely equitable relief. In my study, ninety-nine (8.4%) of the 1183 Section 1983 cases filed against law enforcement fell into one or both of these categories.[83] Second, courts should reject qualified immunity arguments in motions to dismiss so long as the plaintiff has alleged a plausible claim for relief, and should reject qualified immunity arguments in summary judgment motions

76 Pearson v. Callahan, 555 U.S. 223, 231 (2009) (alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment))).

77 For additional information about the districts and my methodology, see Schwartz, *supra* note 40, at 19–25.

78 *Id.* at 60.

79 *See id.*

80 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

81 Malley v. Briggs, 475 U.S. 335, 341 (1986).

82 *Id.*

83 *See* Schwartz, *supra* note 40, at 27. Some might wonder whether these filing practices are evidence that qualified immunity encourages cases seeking institutional and forward-looking remedies. This may be true to some extent—fifty-four of these ninety-nine cases were filed by attorneys, and the unavailability of qualified immunity for these claims might have influenced their filing decisions. (The other forty-five cases were filed by pro se litigants who were unlikely to know about these intricacies of qualified immunity doctrine.) Some might view the encouragement of institutional and forward-looking remedies to be a positive side effect of qualified immunity doctrine. Note, however, that none of these ninety-nine cases resulted in a court decision finding a constitutional violation or an award of injunctive or declaratory relief.

so long as the plaintiff has created a factual dispute about whether the officer violated her clearly established rights.[84] District courts in my dataset wrote multiple opinions making clear that they understood qualified immunity was intended to resolve cases before discovery and trial, but denying the motions because the plaintiffs had met their burdens.[85] Third, even when courts grant defendants' qualified immunity motions, the grants will not be dispositive so long as additional claims or defendants remain in the cases. In my study, courts granted fifty-three qualified immunity motions in full, but only thirty-four (64.2%) grants were dispositive; in the others, additional claims or parties continued to expose government officials to the possible burdens of discovery and trial.[86] For each of these reasons, qualified immunity is ill-suited to play the role the Court expects it to play in the resolution of constitutional claims.

My findings also suggest that qualified immunity doctrine plays a limited role in the disposition of constitutional claims against law enforcement because there are so many other ways in which suits can be dismissed before discovery and trial. Courts dismissed 126 (10.7%) of the cases in my dataset before defendants responded because the plaintiffs filed frivolous claims, failed to serve defendants, or failed to prosecute their cases.[87] Even when defendants could raise qualified immunity, they often chose not to do so. Defendants moved to dismiss on qualified immunity grounds in just 13.9% of the cases in which they could raise the defense.[88] In two-thirds of their motions to dismiss, defendants did not include a qualified immunity argument.[89] Qualified immunity played a similarly limited role in district courts' decisions. When defendants raised qualified immunity in their motions to dismiss and courts granted those motions, courts three times more often granted the motions on grounds other than qualified immunity.[90] Defendants were more likely to raise qualified immunity at summary judgment, courts were more likely to grant defendants' summary judgment motions on qualified immunity grounds, and these summary judgment grants were more often dispositive.[91] Yet, even when defendants raised qualified immunity in their summary judgment motions, courts more often than not granted those motions on other grounds.[92]

Decades ago, Justice Kennedy recognized that the Supreme Court's qualified immunity jurisprudence duplicates other procedural barriers the Court has erected. In *Harlow v. Fitzgerald*, the Supreme Court eliminated consideration of officers' subjective intent to facilitate resolution of qualified

84 *See* Schwartz, *supra* note 40, at 55–56.
85 *See id.* at 54–55.
86 *Id.* at 44.
87 *Id.* at 56.
88 *Id.* at 31.
89 *See id.* at 34.
90 *See id.* at 39.
91 *See id.* at 48–49.
92 *See id.* at 39.

immunity motions at summary judgment.[93] Four years after *Harlow*, the Supreme Court issued three decisions that clarified and heightened the standard for defeating summary judgment.[94] And six years after that, Justice Kennedy observed, in *Wyatt v. Cole*, that those summary judgment decisions might have obviated the need for *Harlow*.[95] My research confirms Justice Kennedy's view. District courts' decisions suggest that the Court's summary judgment standards—not to mention its standards for pleadings and for constitutional violations—largely obviate the need for qualified immunity doctrine to screen out cases before trial.

Further research can explore the role that qualified immunity plays in the litigation of constitutional claims against other types of government officials. But all available evidence indicates that qualified immunity does little to shield government officials from discovery and trial in filed cases, and that the doctrine is both ill-suited and unnecessary to play its intended role.

C. Qualified Immunity Does Not Protect Against Overdeterrence

The only remaining justification that the Supreme Court has offered for qualified immunity is that it protects against overdeterrence. The Court fears that damages actions may "deter[ ] . . . able citizens from acceptance of public office" and "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties," and expects that qualified immunity will protect against these ills.[96] Yet there are three reasons to believe that qualified immunity does not actually serve as a shield against overdeterrence.

First, available evidence offers little support for the Supreme Court's concern that the threat of litigation "dampen[s] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[97] Multiple studies have found that law enforcement officers infrequently think about the threat of being sued when performing their jobs.[98] Notably, many of these same studies found that a substantial

93 Harlow v. Fitzgerald, 457 U.S. 800 (1982).

94 *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

95 Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (declining to decide "whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy," but concluding that he "would not extend that approach to other contexts" because, although "*Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent" "subsequent clarifications to summary-judgment law have alleviated that problem").

96 *Harlow*, 457 U.S. at 814 (second alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

97 *Id.* (citation omitted).

98 *See* VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006) (concluding, based on several studies, that "the prospect of civil liability has a deterrent effect in the abstract study environment but that it does not have a major impact on field

percentage of officers believe lawsuits deter unlawful behavior[99] and believe that officers should be subject to civil liability.[100] Taken together, these find-

practices"); Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT'L REV. POLICE DEV. 19, 26 (1995) (finding that 87% of state police officers, 95% of municipal police officers, and 100% of university police officers surveyed did not consider the threat of a lawsuit among their "top ten thoughts" when stopping a vehicle or engaging in a personal interaction); Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 529, 542 (2003) (surveying sheriff's deputies, corrections officers, and municipal police officers in a southern state and finding that 62 percent of respondents "either disagreed or strongly disagreed that the threat of civil liability hinders their ability to perform their duties," but that "46 percent of the respondents indicated that the threat of civil liability was among the top ten thoughts they had when performing emergency duties"); Tom "Tad" Hughes, *Police Officers and Civil Liability: "The Ties that Bind"?*, 24 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 240, 256 (2001) (reporting that a survey of Cincinnati police officers revealed that "78.2 percent of officers disagree or strongly disagree that they consider the potential for being sued when they stop a citizen"); Eric G. Lambert et al., *Litigation Views Among Jail Staff: An Exploratory and Descriptive Study*, 28 CRIM. JUST. REV. 70, 79, 81 (2003) (reporting that when corrections officers were asked whether civil liability "influenced their decision making when performing emergency duties, 28 percent said that it did, 63 percent said that it did not, and 9 percent were unsure," and that "[m]ore than 70 percent of the respondents indicated that civil lawsuits did not hinder their ability to do their jobs"); Kenneth J. Novak et al., *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 352, 360, 363 (2003) (finding that officers "tended to disagree" with the statement: "when I stop a citizen one of the first things that goes through my mind is the potential for being sued," but that "22 percent agreed or strongly agreed that they were cognizant of the potential for being sued during encounters with citizens"). Note that another study found that a higher percentage of police chiefs were influenced by the threat of litigation when making decisions affecting the public. *See* Michael S. Vaughn et al., *Assessing Legal Liabilities in Law Enforcement: Police Chiefs' Views*, 47 CRIME & DELINQUENCY 3 (2001).

99 *See* Garrison, *supra* note 98 (finding that 62% of a sample of fifty officers from state, municipal, and university law enforcement agencies in Pennsylvania agreed with the statement "[t]he police officer who knows he can be sued for violating an individual's civil rights is deterred from violating an individual's civil rights"); Hall et al., *supra* note 98, at 541 (finding that 48% of respondents "either agreed or strongly agreed that the threat of civil liability deters misconduct among criminal justice employees"); Hughes, *supra* note 98 (finding that 38% of officers believe the threat of liability deters civil rights violations); Lambert et al., *supra* note 98, at 80 (reporting that 50% of officers surveyed agreed or strongly agreed with the statement "[t]he threat of a civil suit deters negligent and unlawful behavior by public safety officials," and just 14% agreed or strongly agreed with the statement "[t]he threat of a civil suit hinders my ability to perform my duties").

100 *See, e.g.*, Garrison, *supra* note 98, at 25 (reporting that 52% of officers surveyed disagreed with the statement: "police officers should not be subject to civil suits by citizens"); Hall et al., *supra* note 98, at 538 (finding that 62% of officers surveyed "agreed or strongly agreed that officers should be personally subject to civil liability for violating the civil rights of citizens," and that "72 percent agreed or strongly agreed that officers should be personally liable for their negligence"); Hughes, *supra* note 98, at 254 (finding 57.2% of officers surveyed disagreed or strongly disagreed with the statement: "police officers should not be subject to civil suits by citizens"); Lambert et al., *supra* note 98, at 79 (finding

ings suggest that many officers believe lawsuits deter misbehavior by other officers, but do not themselves think about the threat of civil liability when performing their duties.

Second, to the extent that people are deterred from becoming police officers and officers are deterred from vigorously enforcing the law, available evidence suggests the threat of civil liability is not the cause. Instead, departments' difficulty recruiting officers has been attributed to high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits.[101] Similarly, a recent survey found that a majority of officers believe recent high-profile shootings of Black men—not civil suits or the threat of liability—have made their job harder and discouraged them from stopping and questioning people they consider suspicious.[102]

Finally, assuming for the sake of argument that the threat of liability deters officers, it is far from clear that qualified immunity could mitigate those deterrent effects. Presumably, the Court expects that the threat of financial sanctions and the burdens associated with participating in discovery and trial discourage people from applying for government positions or chill officer behavior on the job. And presumably the Court believes that qualified immunity limits those negative effects of lawsuits by shielding government officials from financial liability and the burdens of litigation. But I have shown that indemnification practices and litigation dynamics already shield government officials from financial sanctions, obviating the need for qualified immunity to serve that role. I have also shown that qualified immunity

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"[a]lmost 59 percent [of jail staff surveyed] believed that public safety officers should be subject to civil suits for violating the rights of citizens"); Novak et al., *supra* note 98, at 364 (finding that "[t]he preponderance of officers disagreed with the statement that 'officers should not be subject to civil suits by citizens'"); Vaughn et al., *supra* note 98 (finding that 92% of police chiefs surveyed believed officers should be subject to civil suits).

101 *See, e.g.*, Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts to Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015), http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081 (describing "tight budgets and strained relationships with communities of color" as the reasons police departments have struggled to meet their goals of diversifying their police departments); Daniel Denvir, *Who Wants to Be a Police Officer?*, CITYLAB (Apr. 21, 2015), http://www.citylab.com/crime/2015/04/who-wants-to-be-a-police-officer/391017 (reporting Chuck Wexler, the executive director of the Police Executive Research Forum, as saying: "[A]ll of the negative images of the police have made it more difficult to hire and recruit candidates into this profession"); Oliver Yates Libaw, *Police Face Severe Shortage of Recruits*, ABC NEWS (July 10, 2016), http://abcnews.go.com/US/story?id=96570 (attributing the low rate of police applicants to low unemployment, relatively low law enforcement salaries, and rigorous physical and psychological tests and other prerequisites for law enforcement jobs); William J. Woska, *Police Officer Recruitment—A Decade Later*, POLICE CHIEF MAG. (Apr. 2016), http://www.policechiefmagazine.org/police-officer-recruitment/ (describing a number of challenges of officer recruitment, including bad publicity, community anger, job competition from the technology sector, the recession, and the reduction in law enforcement retirement benefits).

102 RICH MORIN ET AL., PEW RESEARCH CENTER, BEHIND THE BADGE 15 (2017).

does little to shield government officials from discovery and trial in filed cases. If the burdens of discovery and trial do in fact discourage potential job applicants and chill officers' behavior, qualified immunity doctrine can do little in practice to counteract these effects.

There would likely be disagreement among the Justices—and there would certainly be disagreement among the public—about what would constitute optimal deterrence of law enforcement officers. But regardless of how "unflinching" one believes an officer should be in the "discharge of their duties,"[103] the threat of being sued appears to play little role in the decisions of job applicants and officers on the street. And qualified immunity doctrine could do little to mitigate whatever concerns about liability do exist.

III. Qualified Immunity Renders the Constitution Hollow

The Supreme Court might alternatively decide to eliminate or limit qualified immunity doctrine because, in Justice Sotomayor's words, it "renders the protections" of the Constitution "hollow."[104] Although Justice Sotomayor raised this concern regarding one case in particular, *Mullenix v. Luna*, it is a concern that could well be raised about the Court's qualified immunity jurisprudence more generally. Although qualified immunity is the reason few Section 1983 cases against law enforcement are dismissed, the Court's qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights.

When qualified immunity was first announced by the Supreme Court in 1967, it was described as a good faith defense from liability. For the next fifteen years, defendants seeking immunity were required to show both that their conduct was objectively reasonable and that they had a "good faith" belief that their conduct was proper.[105] But, in 1982, the Court eliminated the subjective prong of the defense, entitling a defendant to qualified immunity so long as he did not violate "law [that] was clearly established at the time an action occurred."[106]

The Court's definition of "clearly established" law has narrowed significantly over the past thirty-five years. Although the Court once held that a plaintiff could defeat qualified immunity by showing an obvious constitutional violation,[107] the Court's subsequent decisions have required that plaintiffs point to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority."[108] In its most recent decisions, the Court has only been willing to assume arguendo that circuit precedent or a consensus

103 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (citation omitted).
104 Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).
105 *See Harlow*, 457 U.S. at 815–16.
106 *Id.* at 818.
107 *See* Hope v. Pelzer, 536 U.S. 730 (2002).
108 Wilson v. Layne, 526 U.S. 603, 617 (1999).

of cases can clearly establish the law—suggesting that Supreme Court precedent is the only surefire way to clearly establish the law.[109]

Moreover, the Supreme Court's qualified immunity decisions require that the prior precedent clearly establishing the law have facts exceedingly similar to those in the instant case. Although the Court has repeatedly assured plaintiffs that it "'do[es] not require a case directly on point' for a right to be clearly established," it has also repeatedly cautioned that "'clearly established law' should not be defined 'at a high level of generality.'"[110] Indeed, the Court has stated—and regularly restated—that government officials violate clearly established law only when "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right.'"[111] In recent years, the Court has reversed several lower court denials of qualified immunity because the lower court "misunderstood the 'clearly established' analysis" and "failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment."[112]

The challenge of identifying clearly established law is heightened further by the Court's decision in *Pearson v. Callahan*, which allows courts to grant qualified immunity without ruling on the underlying constitutional violation.[113] Courts considering qualified immunity motions are faced with two questions—whether a defendant has violated the Constitution, and whether the constitutional right was clearly established. In 2001, the Supreme Court instructed lower courts deciding qualified immunity motions to answer both questions: The Court reasoned that requiring lower courts to rule on the constitutionality of a defendant's behavior would allow "the law's elaboration from case to case . . . . The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[114] In 2009, in *Pearson v. Callahan*, the Court reversed itself and held that lower courts could grant qualified immunity without first ruling on the constitutionality of a defendant's behavior.[115]

Taken together, the Court's qualified immunity decisions have created a vicious cycle. The Supreme Court has instructed lower courts that they must

109 *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 70–71 (2016) (describing this shift in the Supreme Court's qualified immunity decisions in recent years).

110 White v. Pauly, 137 S. Ct. 548, 551–52 (2017) (alteration in original) (first quoting Mullenix v. Luna, 136 S. Ct. 306, 308 (2015); and then quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)).

111 *Ashcroft*, 563 U.S. at 741 (alteration in original) (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

112 *White*, 137 S. Ct. at 552; *see also supra* notes 2–3 and accompanying text (describing the frequency with which the Supreme Court grants certiorari and reverses qualified immunity denials and the Court's criticisms of these lower court opinions).

113 Pearson v. Callahan, 555 U.S. 223 (2009).

114 Saucier v. Katz, 533 U.S. 194, 201 (2001).

115 *Pearson*, 555 U.S. at 223–24.

grant qualified immunity unless they can find a prior Supreme Court decision, binding precedent, or consensus of cases in which "an officer acting under similar circumstances"[116] has been found to have violated the Constitution. Yet the Court has also advised lower courts that they can grant qualified immunity without ruling on plaintiffs' underlying constitutional claims—reducing the frequency with which lower courts announce clearly established law.[117] And the Supreme Court is among the worst offenders on this score; although the Supreme Court has suggested in recent decisions that it may be the only body that can clearly establish the law for qualified immunity purposes,[118] it repeatedly grants qualified immunity without ruling on the underlying constitutional claim.[119] This precise illogic is on full display in *Mullenix v. Luna*, the Supreme Court decision that provoked Justice Sotomayor's expression of concern about the damage qualified immunity does to the Constitution.

In *Mullenix*, the Supreme Court reversed the Fifth Circuit and held that qualified immunity protected Texas Department of Public Safety Officer Mullenix from liability for killing Israel Leija, Jr., as he was fleeing arrest for violating misdemeanor probation.[120] Officer Mullenix "fired six rounds in the dark at a car traveling 85 miles per hour . . . without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it."[121] Mullenix's first words to his supervisor after the shooting were, "How's that for proactive?"—apparently referring to an earlier conversation in which the supervisor "suggested that [Mullenix] was not enterprising enough."[122] The district court denied Mullenix's summary judgment motion based on qualified immunity and the Fifth Circuit affirmed. But, in a per curiam opinion, the Supreme Court held that the trooper did not violate clearly established law.

In reaching this conclusion, the Court reviewed three of its prior decisions involving law enforcement officers who shot fleeing suspects,[123] one of which granted the officer qualified immunity without ruling on the underlying constitutional claim.[124] The Court then described these cases as creating a "hazy legal backdrop against which Mullenix acted."[125] Finally, the Court

116 *White*, 137 S. Ct. at 552.

117 *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37 (2015) (comparing several studies that examine qualified immunity decisions before and after *Saucier* and *Pearson*, and finding that courts after *Pearson* decide constitutional questions less frequently and are also less likely to find constitutional violations when granting qualified immunity).

118 *See supra* note 109 and accompanying text.

119 *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (describing several of these cases).

120 Mullenix v. Luna, 136 S. Ct. 305, 312 (2015) (per curiam).

121 *Id.* at 313 (Sotomayor, J., dissenting).

122 *Id.* at 316 (Sotomayor, J., dissenting).

123 *Id.* at 309–11 (opinion of the Court).

124 *See* Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

125 *Mullenix*, 136 S. Ct. at 309.

relied on this uncertainty to grant qualified immunity, but did not decide whether Mullenix violated the Constitution—and so did not clear the haze. Mullenix's remark to his supervisor played no role in the analysis, as "an officer's actual intentions are irrelevant" to the qualified immunity analysis.[126] Justice Sotomayor, dissenting, wrote that the Court's decision "sanction[s] a 'shoot first, think later' approach to policing" and thereby "renders the protections of the Fourth Amendment hollow."[127]

Concerns that the Court's qualified immunity jurisprudence renders the Constitution hollow are even more acute for constitutional claims involving new technologies and techniques. Despite the Court's discussion of the "hazy legal backdrop" in *Mullenix*, there are decades of decisions analyzing when shooting a fleeing suspect constitutes excessive force.[128] There are comparatively fewer cases assessing the constitutional rights of citizens to record the police or defining when Taser use constitutes excessive force.[129] By narrowly defining "clearly established law" and allowing courts to grant qualified immunity without ruling on the underlying constitutional claim, the Supreme Court leaves important questions about the scope of constitutional rights "needlessly floundering in the lower courts," as Karen Blum has written, possibly never to be clarified.[130] And even when there is some clarifi-

126 *Id.* at 316 (Sotomayor, J., dissenting). Justice Ginsburg recently raised concerns about the failure to consider evidence of officer intent in another setting—probable cause determinations. The failure to do so, she wrote, "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." District of Columbia v. Wesby, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part).

127 *Mullenix*, 136 S. Ct. at 316 (Sotomayor, J., dissenting). Justice Sotomayor, joined by Justice Ginsburg, raised similar concerns in her dissent in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018). In that case, Officer Kisela shot the plaintiff when she was holding a kitchen knife by her side and speaking with her roommate in a "composed and content" manner. *Id.* at 1155. Two other officers on the scene held their fire, but Kisela shot Hughes four times without a prior warning. *Id.* Justice Sotomayor found that Kisela violated the Fourth Amendment and that prior precedent clearly established the unconstitutionality of his conduct. *Id.* at 1157–58, 1161. She further wrote that the Court's trend of summarily reversing denials of qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment," and that the Court's decision in *Kisela* "sends an alarming signal to law enforcement officers . . . that they can shoot first and think later." *Id.* at 1162.

128 *See, e.g.*, *Mullenix*, 136 S. Ct. at 309–11 (describing some of these cases).

129 For discussions of the doctrinal confusion in these areas, see Matthew Slaughter, *First Amendment Right to Record Police: When Clearly Established Law Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101 (2015); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285 (2012).

130 Blum, *supra* note 119, at 1895. Blum describes the slow road to constitutional clarity in the circuits regarding the existence of a First Amendment right to record the police. *Id.* But there are still five circuits by Blum's count that have not announced such a right. And new technologies may create even more complex constitutional questions than those involved in recording the police. *See, e.g.*, Woolfstead, *supra* note 129 (describing lack of agreement among courts about what level of force Tasers constitute and the differences between using Tasers in "dart mode" and "drive-stun" mode).

cation about the existence and scope of novel constitutional rights, qualified immunity may still be granted if the facts of those prior cases are not sufficiently similar to the case at hand.

The Supreme Court has described qualified immunity doctrine as balancing "two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[131] By simultaneously allowing courts to decide qualified immunity motions without reaching the underlying constitutional questions and requiring plaintiffs to produce circuit or Supreme Court opinions finding constitutional violations in cases with nearly identical facts, and by ignoring available evidence of officers' culpable intent, the Court perpetuates uncertainty about the contours of the Constitution and sends the message to officers that they may be shielded from damages liability even when they act in bad faith.

These criticisms of qualified immunity may appear to sit in some tension with my finding that filed cases are rarely dismissed on qualified immunity grounds. If qualified immunity is the reason that less than four percent of filed cases are dismissed, can it render the protections of the Constitution hollow? Unfortunately, the answer is yes. Qualified immunity doctrine imperils government accountability in several ways, even as it is the reason few cases are dismissed. First, as Justice Sotomayor has explained in *Mullenix* and *Kisela v. Hughes*, the Supreme Court's flurry of recent decisions granting qualified immunity—even to officers who have acted unreasonably or in bad faith—suggest to officers that they can act with impunity.[132] As Justice Sotomayor has written, an opinion like *Kisela* "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[133] The Supreme Court's decisions can send this message to police and the public regardless of how many decisions are dismissed on qualified immunity grounds in the lower courts.

Second, qualified immunity doctrine may discourage people from bringing cases when their constitutional rights are violated.[134] The Supreme Court's decisions send the message to plaintiffs' attorneys that even Section 1983 cases with egregious facts run the risk of dismissal on qualified immunity grounds, and encourage defense counsel to raise qualified immunity at every turn and immediately appeal district court decisions denying their motions.[135] These dynamics likely increase the cost, complexity, and delay associated with litigating Section 1983 cases, and these increased risks and costs may discourage attorneys from taking cases involving novel constitu-

131 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

132 *See supra* note 127 and accompanying text (describing Justice Sotomayor's concerns).

133 Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

134 For discussion of this possibility, as well as the possibility that qualified immunity doctrine causes plaintiffs not to file insubstantial cases, see *infra* Section IV.C.

135 For further discussion of this possibility, see *id.* *See also* Schwartz, *supra* note 40.

tional claims and cases that involve clear constitutional violations but low damages.[136] Qualified immunity can play this role in constitutional litigation while still being the reason few filed cases are dismissed.

Third, decisions allowing courts to grant qualified immunity without ruling on the underlying constitutional claims may compromise police departments' policies and trainings. Many law enforcement agencies' policies and trainings hew closely to Supreme Court and circuit decisions.[137] When the Supreme Court and circuit courts issue opinions announcing new constitutional rights—or clarifying that rights do not exist—law enforcement agencies modify their policies and trainings to conform to those opinions.[138] But when the Supreme Court suggests that only its decisions can clearly establish

136 *See infra* Section IV.C.

137 Ingrid Eagly and I have studied Lexipol LLC, a private company that provides standardized policies and trainings to 3000 law enforcement agencies in thirty-five states across the country, including 95% of all California law enforcement agencies. *See* Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018). Each Lexipol policy is designated as based on "federal law," "state law," "best practices," or is "discretionary." Lexipol representatives warn their subscribers not to change those policies based on federal and state law. Jurisdictions understand this message—one deputy chief explained that policies designated as "best practices" or "discretionary" are viewed as "optional," but those that are the "law" are required. Of course, jurisdictions vary in the degree to which they rely on court decisions when crafting their policies and trainings, but we have found that the dominant private police policymaker relies heavily on court opinions. *See also infra* note 139.

138 *See, e.g.*, POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (2016) (explaining that after the Fourth Circuit held that using a Taser repeatedly in drive-stun mode was unconstitutional, "several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies" in response to the decision); Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 543 (2013) ("After the Court prohibited random stops of motorists to check their licenses and registration in *Delaware v. Prouse*, the District of Columbia Police Department almost immediately overhauled its policies to comply with the new ruling. More recently, after the Court held that the installation and subsequent use of a GPS device to monitor a vehicle's movements was a 'search' within the meaning of the Fourth Amendment in *United States v. Jones*, the FBI's general counsel reported that the decision caused the agency to turn off nearly 3,000 monitoring devices."); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008) (observing that California law enforcement agencies stopped training their officers not to conduct warrantless searches of trash—a requirement of California constitutional law—after the United States Supreme Court rejected this prohibition); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121 (2001) (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision reaffirming *Miranda*); Patrick Healy, *LAPD Commission Adds to Guidelines for Review of Police Use of Force*, NBC L.A. (Feb. 19, 2014), https://www.nbclosangeles.com/news/local/LAPD-Commission-Adds-to-Guidelines-for-Review-of-Police-Use-of-Force-246094151.html (reporting that a decision by the California Supreme Court that "tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability" caused the Los Angeles Police Commission to change the ways in which it evaluates whether force used by its officers was proper).

the law, and then repeatedly grants qualified immunity without ruling on the underlying constitutional questions, law enforcement agencies have little in the way of guidance about how to craft their policies.

For example, the Supreme Court has spent countless hours and an outsized portion of its docket in recent years deciding whether officers who use deadly force are entitled to qualified immunity, but these opinions offer virtually no guidance to law enforcement agencies about what constitutes excessive force. Indeed, the North Star for many departments' use of force policies is *Graham v. Connor*, a Supreme Court decision that is almost thirty years old and itself provides limited guidance to law enforcement agencies regarding what constitutes excessive force.[139]

If qualified immunity doctrine effectively shielded government officials from burdens associated with litigation in insubstantial cases, one might justify these impositions on government accountability as a necessary evil. But the Court's qualified immunity jurisprudence threatens to undermine government accountability in each of these ways without meaningfully achieving its goals of shielding government defendants from financial exposure and shielding officials from litigation burdens when they act reasonably. The failure of qualified immunity to achieve its intended policy goals makes its negative impact on government accountability indefensible.

IV. Alternative Defenses of Qualified Immunity Are Unpersuasive

The Supreme Court's qualified immunity doctrine is ungrounded in history, unnecessary or ill-suited to serve its intended policy goals, and counterproductive to interests in holding government wrongdoers responsible when they have violated the law. The Court has said that evidence undermining its justifications for qualified immunity would be reason to revisit the sensibility of the defense.[140] Yet the Justices might, instead, advance alternative justifications for qualified immunity. Commentators have offered three alternative rationales for qualified immunity that the Court might conceivably adopt.

139 *See* Eagly & Schwartz, *supra* note 137; *see also* Graham v. Connor, 490 U.S. 386 (1989). Some progressive agencies are adopting policies and trainings that offer more specific guidance on use of force than does *Graham*, but the founder of Lexipol LLC, which writes police policies for 3000 agencies nationwide, argues that use of force policies should not go beyond the guidance offered by the Supreme Court in *Graham*, writing:

> Several years ago, our forefathers decided that there would be nine of the finest legal minds in the country who would interpret the law of the land. For almost 30 years, law enforcement has learned to function under the guidance of the Supreme Court's "objective reasonableness" standard. What would happen if each of the 18,000+ law enforcement agencies in the United States formulated their own standard "beyond" *Graham*?

Eagly & Schwartz, *supra* note 137, at 928 (quoting Bruce D. Praet, *National Consensus Policy on Use of Force Should Not Trigger Changes to Agency Policies*, Lexipol (Jan. 25, 2017), http://www.lexipol.com/news/use-caution-when-changing-use-of-force-policy-language/).

140 *See* Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (observing that evidence undermining its assumptions about constitutional litigation might "justify reconsideration of the balance struck" by its qualified immunity jurisprudence).

The first is that qualified immunity doctrine shields government budgets from excess liability and thereby encourages government officials to instruct their officers vigorously to enforce the law. The second is that qualified immunity encourages development of constitutional law because it allows courts to announce new constitutional rights without imposing damages liability on the officials whose conduct was at issue in the case. The third is that qualified immunity protects government defendants from insubstantial suits by discouraging attorneys from filing such cases. In this Part, I will explain why the Court would be ill-advised to adopt any of these rationales for qualified immunity.

A. Qualified Immunity Cannot Be Justified as a Protection for Government Budgets

Although individual officers virtually never personally satisfy settlements and judgments entered against them, qualified immunity has been described as a financial protection for local governments that indemnify their officers.[141] Government officials, concerned about the costs of damages awards, might encourage inaction by their officers to reduce liability costs.[142] If so, qualified immunity would arguably allow government officials to make decisions without undue concern about the financial impact of those decisions. In order for qualified immunity to be justified on these grounds, one must assume that government officials would encourage inaction by their employees in response to fears of financial liability, and that qualified immunity lessens those concerns and allows government officials instead to encourage vigorous enforcement of the law.

There are three reasons for skepticism about this rationale for qualified immunity. First, this rationale relies on unfounded assumptions about the flow of information about lawsuits within government bureaucracies. In order for lawsuit payouts to influence government officials' management of their officers, officials would need enough information about those lawsuits—including the officers named, the underlying facts, and the amount paid—to make policy and supervision decisions aimed at reducing the costs of those types of cases in the future. My research suggests that most law

141 *See, e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007) (noting that widespread indemnification undermines "the stated justification for qualified immunity," but "[w]hen qualified immunity is viewed from the standpoint of a public employer—the party that bears the economic burden of liability—this doctrine has a compelling justification").

142 *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 245–46 (2013) ("Civil-rights judgments and the accompanying awards of attorneys' fees are on-budget costs. At least for states and localities . . . increased on-budget costs mean higher taxes or cuts in other expenditures. The political penalties for either choice can be severe. There is this additional reason to think, therefore, that while erroneous government action and erroneous government inaction may be equally costly to society as a whole, the former is more likely to trigger on-budget liability and thus to affect and distort government behavior.").

enforcement agencies do not collect this type of information about lawsuits brought against their officers.[143] Indeed, in most departments, there appears to be minimal effort to track or analyze the nature of claims filed against their officers or the evidence generated during discovery in those cases.[144] Many large police departments do not even have ready access to information about the amount paid to satisfy settlements and judgments against them and their officers.[145]

The fact that most law enforcement agencies do not systematically gather and analyze information from damages actions brought against them does not mean that these suits can never impact policies and practices. Lawsuits that receive press coverage may capture the attention of police chiefs and other policy makers, and may inspire departments to institute changes to prevent future similar cases.[146] Information revealed during discovery and trial—particularly if it is disclosed to the public—can create political pressure on departments to take action.[147] Information generated during litigation can also be used to support future cases seeking systemic reform.[148] Plaintiffs sometimes negotiate settlements in damages actions that require reforms to police policies and trainings.[149] And police misconduct attorneys have told me that sustained litigation pressure on particular departments some-

143 *See generally* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010).

144 *See id.*

145 *See* Schwartz, *supra* note 46, at 903 (reporting that fifty-eight of the seventy largest law enforcement agencies to which I submitted public records requests did not have information about payouts in lawsuits brought against their agencies and officers and so had to seek the information from other municipal departments).

146 *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 844 (2012) (describing this possibility). For example, large litigation payouts and several high-profile shootings led the Los Angeles County Board of Supervisors to order an independent commission to review the Los Angeles County Sheriff's Department in 1992. *See* JAMES G. KOLTS ET AL., LOS ANGELES COUNTY SHERIFF'S DEPARTMENT 1 (1992) (reporting that the independent commission was prompted by "[a]n increase over the past years in the number of officer-involved shootings," "[f]our controversial shootings of minorities by LASD deputies in August 1991," and the fact that "Los Angeles County . . . paid $32 million in claims arising from the operations of the LASD over the past four years"). Twenty years later, another independent commission investigated the Los Angeles Sheriff's Department's handling of the L.A. County Jail, prompted in part, again, by high profile litigation against the Department. *See* REPORT OF THE CITIZENS' COMMISSION ON JAIL VIOLENCE 42, 185 (2012).

147 *See* Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1057 n.7 (2015) (describing studies showing lawsuits have revealed information that has advanced regulatory efforts in a number of areas).

148 For two examples of complaints that use prior lawsuits to demonstrate a pattern or practice of misconduct, see Amended Complaint and Demand for Jury Trial, An v. City of New York, 16-cv-05381 (S.D.N.Y. June 2, 2017); Third Amended Complaint for Damages, Starr v. County of Los Angeles, 08-cv-00508 (C.D. Cal. Oct. 10, 2008).

149 *See, e.g.*, Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 254–57 (2016) (describing multiple cases that have led to reforms).

times yields positive results.[150] But if law enforcement agencies do not keep track of or analyze basic information about the lawsuits filed and resolved against their officers, they cannot make policy and supervision decisions informed by most cases brought against them.

Second, this rationale for qualified immunity assumes that, absent qualified immunity, governments and police departments would feel the costs of lawsuit payouts so acutely that officials would promote timidity on the part of their officers as a way to reduce lawsuit costs in the future. Yet lawsuit payouts have no financial consequences for the majority of large law enforcement agencies across the country. In a prior study, I gathered information about lawsuit budgeting and payment arrangements in sixty-two of the seventy jurisdictions with the largest law enforcement agencies and in jurisdictions with thirty-eight smaller agencies.[151] At least 60% of the largest agencies and 75% of the smaller self-insured agencies in my study feel no financial consequences when lawsuit costs increase and no financial benefits when lawsuit costs decline.[152] There may well be political pressures associated with these payouts.[153] But those political pressures will not reliably translate into policy and supervision decisions if the agency in question does not have enough information about trends in the lawsuits brought against it to know how to reduce those costs.

It is less certain what impact lawsuits have on the law enforcement agencies that do suffer some financial consequences of payouts. There are reasons to believe that payouts may influence policies and practices in these departments to some degree. But no officials I interviewed during the course of my study reported that their police department's financial responsibility for payouts negatively affected their policy or training decisions, or otherwise encouraged timidity.[154] In order to justify qualified immunity as a means of encouraging vigorous government decisionmaking, it would be necessary to show both that lawsuit payouts influence government policy and supervision decisions, and also that lawsuit payouts cause officials to make policy and supervision decisions that favor inaction. Available evidence offers no reason to believe that is the case.

A final reason for skepticism about this rationale for qualified immunity is that it relies on the assumption that qualified immunity doctrine signifi-

150 *See, e.g.*, Telephone Interview with N.D. Ohio Attorney D (on file with author) (reporting that his firm's litigation against the Cleveland Police Department caused the Department to issue a policy prohibiting officers from shooting at moving vehicles); Telephone Interview with M.D. Fla. Attorney G (on file with author) (describing reforms to the Florida jail system and the Jacksonville fire department resulting from litigation); Telephone Interview with E.D. Pa. Attorney G (on file with author) (describing political pressures resulting from a series of damages actions that contributed to a mayor's failure to get reelected).

151 *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1148 (2016).

152 *See id.* at 1203.

153 *See supra* note 146 and accompanying text.

154 *See* Schwartz, *supra* note 151, at 1201.

cantly reduces liability costs. My research makes clear that very few lawsuits are dismissed because of qualified immunity.[155] Moreover, qualified immunity may in fact increase the costs of litigating constitutional cases. In my docket dataset, defendants raised qualified immunity in 154 motions to dismiss—each of which needed to be briefed and argued by the parties. Seven (4.5%) of those motions resulted in the dismissal of plaintiffs' cases. In those seven cases, qualified immunity spared defendants money associated with further litigation—which might have included discovery, summary judgment, and trial. But the parties spent money briefing and arguing qualified immunity in the other 147 motions without a corresponding benefit. Defendants raised qualified immunity in 283 summary judgment motions, twenty-seven of which (9.5%) resulted in dismissal. In these twenty-seven cases, the litigation cost savings would have been modest—discovery was already complete, and the cost of summary judgment practice may in some instances exceed the cost of going to trial.[156] In the other 256 (90.5%) cases, the money and time spent to brief and argue qualified immunity did not spare the parties the costs of trial.

The costs of interlocutory appeals are even more difficult to justify. As Judge James Gwin of the Northern District of Ohio recently explained,

> In the typical case, allowing interlocutory appeals actually increases the burden and expense of litigation both for government officers and for plaintiffs . . . because an interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that (1) could have finished in less than a week, and (2) will often be conducted anyway after the interlocutory appeal.[157]

Given this evidence, there is no basis to conclude that qualified immunity reduces the costs of Section 1983 litigation, and reason to believe it actually increases costs in some cases.

Of course, qualified immunity grants may spare defendants not only the costs of litigation but also the costs of large settlements and jury verdicts. It is possible that there would have been significant payouts in the thirty-eight cases that were dismissed on qualified immunity grounds in my docket dataset.[158] But it is also possible that these cases would have been dismissed on other grounds at the motion to dismiss or summary judgment stages, or

155 *See* Schwartz, *supra* note 40, at 60.

156 *See id.* at 61 (observing that most trials in my dataset lasted just a few days); *see also* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 100 (1997) (observing that, when considering the efficiencies of qualified immunity, "the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case" and "the pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense").

157 Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017).

158 *See* Schwartz, *supra* note 40.

ended in defense verdicts.[159] Indeed, in the two districts in my study with the most qualified immunity dismissals—the Southern District of Texas and the Middle District of Florida—juries appear especially inhospitable to plaintiffs.[160] And even if these thirty-eight cases had resulted in large verdicts or settlements, those payments would have been spread across thirty-two different jurisdictions.[161]

Qualified immunity might also shift the dynamics of civil rights litigation in other ways that shield government coffers—the doctrine might discourage plaintiffs from filing some cases, encourage plaintiffs to settle cases they otherwise would have brought to trial, or reduce cases' settlement value.[162] But even if eliminating qualified immunity increased filings, caused more cases to go to trial, and increased settlement amounts to some degree, it does not follow that these shifts would so imperil government budgets that qualified immunity is necessary to safeguard robust government policymaking. Lawsuit payouts are a miniscule portion of most local government budgets and would remain so even if they increased significantly.[163] Of course, local governments are perpetually strapped for cash, and every dollar counts. But especially given the limited information agencies have about lawsuits brought against them and the limited impact of lawsuit payouts on most law enforcement agencies' budgets, the possibility that qualified immunity might shield local governments from some additional liability costs is insufficient reason to preserve the doctrine.

159 Seventy-seven cases in my study ended in jury verdicts; sixty-seven were defense verdicts, three were split verdicts, and seven were plaintiffs' verdicts. *See id.* at 46. There were another five cases that resulted in plaintiffs' verdicts or split verdicts but were settled after trial: In the Southern District of Texas there were two additional plaintiffs' verdicts; in the Middle District of Florida there was one additional plaintiff's verdict; in the Northern District of California there was one additional plaintiff's verdict; and in the Eastern District of Pennsylvania there was one additional split verdict. Accordingly, all in all, there were sixty-seven defense verdicts, four split verdicts, and eleven plaintiffs' verdicts.

160 Of the twenty-two cases that went to verdict in these two districts, just three were plaintiffs' verdicts.

161 Five qualified immunity dismissals in my dataset were in cases brought against the Houston Police Department, two were in cases brought against the San Francisco Police Department, and two were in cases brought against the Brevard Sheriff's Department. The remaining twenty-nine cases were brought against twenty-nine jurisdictions across the five districts.

162 *See* Schwartz, *supra* note 40; *see also infra* Section IV.C.

163 *See* Schwartz, *supra* note 151, at 1224–449 (finding that, among fifty-three of the largest local governments in the country, payments in lawsuits against law enforcement amounted to 0.15% of government budgets). Note, also, that lawsuits against law enforcement typically make up a significant portion of local government liability costs. *See id.* at 1161 n.58.

B. Qualified Immunity Cannot Be Justified as a Tool to Expand Constitutional Rights

Qualified immunity has long been defended on the ground that it encourages constitutional innovation by courts.[164] Qualified immunity doctrine allows a court to announce a new constitutional right (or expand the contours of an existing one), but shield the defendant in the case from damages liability. As a result, "[j]udges contemplating an affirmation of constitutional rights need not worry about the financial fallout."[165] In a world without qualified immunity, John Jeffries argues: "[E]very extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious."[166] Jeffries is right—it is impossible to quantify the impact eliminating qualified immunity would have on the development of constitutional rights. Even accepting that qualified immunity could be used by courts to spur constitutional innovation, though, this possible benefit should not save qualified immunity doctrine from the chopping block.

As a preliminary matter, qualified immunity does not currently appear to encourage very much in the way of constitutional innovation. To the extent courts use qualified immunity to shield government defendants from liability while expanding constitutional rights moving forward, they need to decide qualified immunity motions and appeals in a particular way—they must find a constitutional violation and then grant qualified immunity on the ground that the right was not clearly established.[167] But several studies of circuit court decisions show that qualified immunity motions are rarely

164 *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99–100 (1999) ("Qualified immunity reduces government's incentives to avoid constitutional violations. At the same time, it allows courts to embrace innovation without the potentially paralyzing cost of full remediation for past practice."); *see also* Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 480 (2011) ("In the absence of official immunity, even some currently well-established constitutional rights and authorizations to sue to enforce them would likely *shrink*, and sometimes appropriately so.").

165 Jeffries, *supra* note 142, at 247.

166 *Id.* at 248. *See also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 915 (1999) (If Section 1983 were expanded and qualified immunity were eliminated, "who could doubt that the effect would be a wholesale rewriting of constitutional rights? While it is impossible to predict just how various rights would be transfigured, drastically increasing the cost of rights would surely result in some curtailment.").

167 Although the Supreme Court once required lower courts to take both of these steps when deciding qualified immunity motions as a means of facilitating the development of constitutional law, it held in 2009 that lower courts can grant qualified immunity without ruling on the underlying constitutional claim. *See supra* notes 113–15 and accompanying text (discussing this shift).

decided in this manner.[168] The Supreme Court also seems uninterested in constitutional innovation through qualified immunity—since its 2009 decision in *Pearson*, it has found a constitutional violation but granted qualified immunity just two times.[169] Indeed, courts are far more likely to grant qualified immunity motions without ruling on the underlying constitutional claim—a practice that increases constitutional stagnation, not innovation.[170]

The fact that courts infrequently find constitutional violations but grant qualified immunity does not foreclose the possibility that they are dramatically innovating on the rare occasions that they do. But, in fact, these decisions offer little in the way of constitutional innovation. In their study of 844 circuit court qualified immunity opinions decided over a three-year period—encompassing 1460 separate claims—Aaron Nielson and Christopher Walker identified fifty-two claims in which circuit courts found one or more constitutional violations but granted qualified immunity.[171] Nielson and Walker kindly shared with me a list of the forty-three cases in which these claims were adjudicated. In an Appendix, I have listed these cases and their holdings.[172] I would characterize none as dramatically expanding the law. Four of the decisions did not develop the law at all: in these cases, the circuit courts found that there was clearly established law holding defendants' conduct was unconstitutional, but granted defendants qualified immunity because the opinions clearly establishing the law were published after defendants engaged in their unconstitutional conduct.[173] The rest offer what could be described as modest or incremental developments of the law, applying well-established constitutional principles to slightly different factual scenarios.[174]

168 Nielson & Walker, *supra* note 117, at 37 (collecting studies that show circuit courts, post-*Pearson* found constitutional violations but granted qualified immunity in 2.5–7.9% of decisions). Courts during the *Saucier* period more often found constitutional violations but granted qualified immunity, although such decisions were still relatively infrequent. *Id.* (collecting studies that show circuit courts, post-*Saucier*, found constitutional violations but granted qualified immunity in 6.5%–13.9% of decisions).

169 *See* Lane v. Franks, 134 S. Ct. 2369 (2014) (finding that a public employee's firing violated the First Amendment, but granting qualified immunity because the right was not clearly established); Safford v. Redding, 557 U.S. 364, 379 (2009) (finding that the strip search of a middle school student violates the Fourth Amendment, but granting qualified immunity because the right was not clearly established).

170 Nielson & Walker, *supra* note 117, at 34 (collecting studies that show circuit courts post-*Pearson* granted qualified immunity without ruling on the underlying constitutional claim in 18.9%–26.7% of claims).

171 *See* Nielson & Walker, *supra* note 43, at 1882–83.

172 *See* Appendix *infra*.

173 *See* Appendix *infra* (describing the holdings in *Rivers v. Fischer*, 390 F. App'x 22 (2d Cir. 2010); *Scott v. Fischer*, 616 F.3d 100 (2d Cir. 2010); *Schwenk v. County of Alameda*, 364 F. App'x 336 (9th Cir. 2010); *Hopkins v. Bonvicino*, 573 F.3d 752 (9th Cir. 2009)).

174 *See* Appendix *infra*; *see also, e.g.*, Karen M. Blum, *Qualified Immunity: Further Developments in the Post-*Pearson *Era*, 27 TOURO L. REV. 243, 255–59 (2011) (describing several additional cases in which courts have found constitutional violations but granted qualified immunity).

Moreover, there is no reason to believe that qualified immunity's shield from damages liability is what motivates courts' decisions to announce constitutional violations in these cases. Available evidence of indemnification and budgeting practices suggest that courts should not be overly concerned about damages awards against individual officers and agencies. Even if judges are unaware of these budgeting and indemnification dynamics, they are unlikely to face many cases in which there is such "massive financial liability" that it would cause a court to "constrain the definition of constitutional rights."[175] And even if an interest in shielding defendants from liability does sometimes encourage courts to decide constitutional questions while granting qualified immunity, other times courts issuing these decisions are, likely, simply applying the law[176]—concluding that defendants violated plaintiffs' constitutional rights but were entitled to qualified immunity because there was no "controlling authority in their jurisdiction"[177] or a "consensus of cases of persuasive authority"[178] with facts so closely resembling the instant case that "existing

175 Jeffries, *supra* note 142, at 248. In support of the constitutional innovation defense of qualified immunity, Jeffries imagines that if school desegregation cases from *Brown* to *Swann* and beyond were brought as damages class actions, courts would have been concerned that "imposing additional requirements on segregated school districts would trigger massive financial liability" and would have issued more tentative rulings as a result. *Id.* But such a case is unlikely to arise today, given the Court's stringent certification requirements for damages class actions. *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). And this type of class action would almost certainly be brought against a municipality, which—unlike individual officers—cannot raise a qualified immunity defense. Jeffries's concern is more apt, though, in a damages class action challenging state action. Because the state could not be named in such a case, plaintiffs would name individual state employees, who would be able to raise qualified immunity as a defense.

176 For research offering varying perspectives regarding the extent to which politics, ideology, and the law influences judicial decisionmaking see, for example, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2013) (arguing that ideology plays a role in all judicial decisionmaking and is particularly powerful as one moves up the judicial hierarchy); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (identifying differences in the ways that Democrat- and Republican-appointed judges vote when the law is unclear); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. REV. 1895, 1898 (2009) (arguing that law, precedent, and deliberation are the primary determinants of judicial decisions); Jeffrey J. Rachlinski et al., *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2051 (2017) (surveying state and federal judges about hypothetical cases and finding that "the aggregate effect of political ideology is either nonexistent or amounts to roughly one-quarter of a standard deviation"). For research suggesting that judges exercise *Pearson* discretion strategically, see Aaron J. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55 (2016).

177 Wilson v. Layne, 526 U.S. 603, 617 (1999).

178 *Id.*

precedent . . . placed the statutory or constitutional question beyond debate."[179]

Perhaps qualified immunity should be understood as encouraging constitutional innovation in a broader sense. Qualified immunity has been described as one component in a bundle of substantive laws, remedial doctrines, and other rules that courts calibrate to achieve an optimal system of rights and remedies.[180] By this logic, regardless of whether qualified immunity is invoked in a particular case, its existence allows courts to read the Constitution and other rules more expansively—and its elimination would cause courts to interpret the Constitution and other rules more narrowly. Qualified immunity arguably played this equilibrating role in *Arizona v. Gant*, a Supreme Court case limiting the circumstances in which an officer can conduct a warrantless vehicle search.[181] Justice Stevens, writing for the majority, addressed concerns that police officers had long relied on the prior legal rule, which allowed such searches, by observing in a footnote that "qualified immunity will shield officers from liability for searches conducted in reasonable reliance on that understanding."[182] We cannot know whether or to what extent the existence of qualified immunity encouraged the Court to issue this decision. It is certainly possible that the Court would not have limited warrantless vehicle searches in *Arizona v. Gant* if qualified immunity did not exist.

But it is just as easy to find a case in which the Court does not treat qualified immunity as an equilibrating force. In *Ziglar v. Abbasi*, the Supreme Court held *Bivens* actions cannot be brought regarding policy decisions made in time of war or national emergency in part out of concern that such litigation would result in "inquiry and discovery" about "sensitive functions" of the executive branch and national-security policy.[183] Justice Breyer, dissenting, observed that these concerns did not necessitate eliminating a *Bivens* remedy for this type of claim because there were already a number of other rules in place that would shield government officials from undue interference, including the scope of the Fourth Amendment, qualified immunity, plausibility pleading rules, and trial courts' abilities to limit discovery. Justice Breyer concluded:

> Given these safeguards against undue interference by the Judiciary in times of war or national-security emergency, the Court's abolition, or limitation of,

179 Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

180 Fallon, *supra* note 164, at 480 (explaining his "Equilibration Thesis," by which qualified immunity, along with other rights, justiciability doctrines, and rules of pleading and proof combine to achieve "the best overall bundle of rights and correspondingly calibrated remedies within our constitutional system"); Levinson, *supra* note 166, at 857–60 (describing his theory of "remedial equilibration," by which "rights and remedies are inextricably intertwined" and courts use restrictions in one area to allow corresponding expansions in others).

181 556 U.S. 332 (2009).

182 *Id.* at 349 n.11.

183 Ziglar v. Abbasi, 137 S. Ct. 1843, 1860–61 (2017).

> *Bivens* actions goes too far. If you are cold, put on a sweater, perhaps an overcoat, perhaps also turn up the heat, but do not set fire to the house.[184]

Although the equilibration idea makes sense, and the Supreme Court appeared to use qualified immunity in this manner in *Arizona v. Gant*, it is far from clear that the Supreme Court is adept at equilibrating, or that it does so very often. Evidence suggests qualified immunity is relatively rarely spurring innovation in circuit courts as well.[185] Qualified immunity doctrine cannot be justified based on such equivocal evidence of its benefits.

Moreover, to whatever extent qualified immunity spurs constitutional innovation, it is an unnecessarily blunt tool for this task. Even John Jeffries, who believes that "*some version of* qualified immunity should be the liability rule for constitutional torts"[186] to encourage constitutional innovation, criticizes the current doctrine for being "too technical, too fact-specific, and far too protective of official misconduct."[187] Specifically, Jeffries believes that the Court's requirement that law can only be clearly established with factually similar cases "has pushed qualified immunity far beyond the reach of any functional justification for that protection,"[188] and that the focus should instead be on whether an officer's conduct was "clearly unconstitutional."[189] This is a step in the right direction, but I would go further.

If a goal of qualified immunity is to spur constitutional innovation by assuring courts that there will be no financial fallout following a finding of unconstitutionality, there are other ways of achieving this goal.[190] The Supreme Court could limit the circumstances in which constitutional innovations are retroactively enforced.[191] Or courts could simply take to heart evidence that individual officers virtually never contribute to settlements and judgments entered against them.[192] Because officers are indemnified, eliminating qualified immunity would not dramatically expand officers' exposure to damages liability and should not, therefore, chill constitutional innovation.

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184 *Id.* at 1884 (Breyer, J., dissenting).

185 *See supra* note 168 (describing evidence of the frequency with which circuit courts find constitutional violations but grant qualified immunity); Appendix (illustrating the modest or incremental nature of circuit courts' development of the law in these cases).

186 Jeffries, *supra* note 142, at 249.

187 *Id.* at 264.

188 *Id.* at 253.

189 *Id.* at 264.

190 *Accord* Fallon, *supra* note 164, at 480 (recommending reconsideration of the extent to which qualified immunity doctrine is well-suited or necessary to achieve its intended goals).

191 *See id.* at 502–03 (discussing nonretroactivity doctrines as a means of encouraging expansion of constitutional rights).

192 *See supra* Section II.A. Courts can also take note of the fact that law enforcement agencies infrequently feel the financial consequences of lawsuits, and that lawsuit payouts are a miniscule part of most jurisdictions' budgets. *See supra* Section IV.A.

C. Qualified Immunity Cannot Be Justified as a Prefiling Filter

When the Supreme Court describes qualified immunity as a shield from the burdens of litigation in insubstantial cases, it always appears to suggest that the doctrine will achieve this goal through the quick dismissal of filed cases. But some defenders of the doctrine appear to believe that qualified immunity could achieve this goal by discouraging insubstantial cases from ever being filed.[193] Although my study of 1183 federal dockets makes clear that qualified immunity ends very few cases, it does not answer what role qualified immunity plays in case-filing decisions.[194] Accordingly, for a future project exploring the role that qualified immunity plays in the decision to file suit, I have surveyed attorneys from around the country who entered appearances in these 1183 cases and conducted in-depth interviews with a subset of these attorneys.[195] Based on the docket dataset, the surveys, and the interviews, I find three reasons to believe qualified immunity cannot be justified as a means of filtering out insubstantial cases before filing.[196]

First, the attorneys I interviewed reported taking into account a number of different considerations when deciding whether to accept a case, including the egregiousness of the facts, the strength of the evidence supporting the claim, whether a jury would find the plaintiff sympathetic, and the amount of recoverable damages. A majority of the attorneys I interviewed reported that qualified immunity was among their considerations when selecting a case, but many in this group suggested it did not play a controlling role in their decision-making process. Lawyers did not have the same views about which factors were the most important to consider, or how they should be considered together, but my interviews consistently reflected the multifaceted nature of attorneys' case-filing decisions. Accordingly, to the extent that qualified immunity is playing a role in case selection, it is playing a role mediated by a number of different concerns.

Second, to the extent that qualified immunity has an impact on case filing decisions, it is far from clear that the doctrine is filtering out only insubstantial cases. The attorneys who reported declining cases because of qualified immunity reported that the doctrine discourages the filing of cases concerning constitutional violations that are novel or ill-defined in circuit and Supreme Court opinions, and cases in which the costs of litigating qualified immunity would be greater than the damages at stake. One attorney reported that the challenges associated with litigating qualified immunity discouraged him from bringing Section 1983 cases altogether. None of these

193 *See, e.g.*, Andrew King, *Keep Qualified Immunity . . . For Now*, MIMESIS (July 1, 2016), http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010 ("Mostly, but for qualified immunity, it's a bonanza for plaintiff's lawyers.").

194 *See generally* Schwartz, *supra* note 40.

195 *See* Joanna C. Schwartz, Qualified Immunity Selection Effects (unpublished manuscript) (on file with author).

196 Alex Reinert reached similar conclusions when he explored the impact of qualified immunity doctrine on plaintiffs' attorneys' decisions to file *Bivens* actions. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011).

responses suggest that qualified immunity is doing a good job of screening out only the "insubstantial" cases.

Third, a majority of the attorneys I interviewed reported that they rarely or never decline to bring a case because of qualified immunity. These attorneys are no fans of the doctrine—they believe that it increases the costs and risks of Section 1983 litigation, and several had had cases dismissed on qualified immunity grounds. Nevertheless, the attorneys offered several reasons why the doctrine does not discourage them from filing cases they would otherwise take. Some explained that the challenges posed by qualified immunity are replicated by other case-screening considerations. For example, several attorneys reported that concerns about judges' and juries' predispositions against police misconduct suits cause them to select cases with facts so egregious that they are not vulnerable to dismissal on qualified immunity. Others explained that they limit the effects of qualified immunity by including state law claims or municipal liability claims—that cannot be dismissed on qualified immunity grounds—in their cases. Some attorneys reported that they are not overly influenced by qualified immunity when selecting cases because the impact of qualified immunity on any given case is difficult to predict. And several attorneys made clear that they will accept a case they view as important to vindicate plaintiffs' rights or defend the Constitution, even if the case is vulnerable to attack on qualified immunity grounds.

Based on this limited sample, I cannot know the extent to which these attorneys' views are representative of those held by plaintiffs' attorneys around the country. But none of these observations support the hypothesis that qualified immunity serves its intended function as a shield against the burdens of litigation by screening out insubstantial cases before they are filed.

V. Moving Forward

The Supreme Court created qualified immunity based on a misunderstanding of common-law defenses in place when Section 1983 became law. The Court has justified its dramatic expansion of qualified immunity in the name of policy aims that the doctrine does not actually advance. The Court's qualified immunity jurisprudence hinders government accountability and inhibits the development of constitutional law. And alternative justifications for the doctrine are equally unconvincing. If the Supreme Court takes this evidence seriously, they should do away with or dramatically limit qualified immunity. And if the Supreme Court refuses to do so, lower courts can resolve qualified immunity motions in ways that mitigate some of the worst aspects of the doctrine.

A. The Supreme Court

If the Supreme Court accepts Justice Thomas's invitation in *Ziglar* to reconsider qualified immunity, takes seriously available evidence demonstrating that the doctrine neither comports with its historical antecedents nor

achieves its intended policy goals, and decides to take action, there are several possible paths forward.[197] The most dramatic course would be to eliminate qualified immunity or conform qualified immunity doctrine to common-law defenses in existence in 1871, when Section 1983 became law. If the Court is inclined to take this type of action, stare decisis should not be an impediment. Principles of stare decisis counsel against overruling statutory precedent and, instead, leaving modifications of such rules to Congress.[198] But Will Baude has observed that the Court does not treat qualified immunity as a "purely statutory doctrine left to the pleasure of Congress," and its perpetual "tinker[ing]" with the doctrine suggests "the Court takes more ownership of it than more orthodox statutory doctrines."[199] Moreover, Scott Michelman has argued that even if the Court views qualified immunity as statutory precedent, evidence that the doctrine has no common-law basis and fails to meet its policy objectives offer compelling reasons to overrule that precedent.[200]

If the Supreme Court is disinclined to overrule qualified immunity, it could, instead, revisit some of its prior decisions to better align the doctrine with evidence of its actual role in constitutional litigation. For example, in *Harlow*, the Court eliminated inquiry into officers' subjective intent so that qualified immunity could more easily be resolved at summary judgment.[201] The Court's narrow interpretation of "clearly established" law—requiring a prior finding of unconstitutionality in a very similar case from a circuit or the Supreme Court—may also be prompted by its interest in facilitating dismissal at summary judgment.[202] But the Court's subsequent decisions strengthening summary judgment standards arguably made *Harlow* unnecessary, as Justice Kennedy has observed.[203] Moreover, evidence that qualified immunity rarely ends cases at summary judgment confirms that the doctrine is ill-suited and unnecessary to shield government officials from trial.

The Supreme Court has recognized that its decision in *Harlow* significantly altered qualified immunity doctrine to protect government officials from the burdens of litigation. Now, faced with evidence that qualified

197 As things stand, the Justices appear moved by different critiques of qualified immunity, and so it is conceivable that a majority of the Court could vote to eliminate or restrict qualified immunity on different grounds. It is premature to consider how an opinion fractured in this way might impact the future of qualified immunity, but for a provocative and compelling argument about how plurality decisions should be read, see Richard Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. (forthcoming 2018).

198 *See* Baude, *supra* note 2, at 80.

199 *Id.* at 81.

200 *See* Scott Michelman, *The Branch Best Qualified to Abolish Qualified Immunity*, 93 NOTRE DAME L. REV. 1999 (2018).

201 *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

202 *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 866 (2010) ("Much of the problem with 'clearly established' law derives from the effort to devise a substantive standard so narrowly 'legal' in character that it can be applied by courts on summary judgment or a motion to dismiss.").

203 *See* Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

immunity does not achieve these intended policy goals, and reasons to believe that the doctrine jeopardizes interests in government accountability, it is incumbent on the Court to revisit its standard. Plaintiffs should be able to defeat a qualified immunity motion by pointing to evidence of an officer's bad faith.[204] And the Court should broaden its definition of clearly established law—by making clear that courts of appeals can clearly establish the law, by defining clearly established law at a higher level of factual generality, and by recognizing obvious constitutional violations, as it did in *Hope*, without reference to an analogous case.[205] These adjustments would better calibrate the doctrine's balance between interests in advancing government accountability and interests in shielding government officials from litigation when they have acted reasonably.

Another possibility would be for the Court to keep the framework for qualified immunity largely intact but allow or encourage lower courts to consider whether qualified immunity would achieve its intended policy goals in particular cases. It makes no sense for government officials to receive qualified immunity if they are virtually certain to be indemnified, because those officials will suffer no financial consequences of a damages award.[206] It makes no sense to ignore evidence of government officials' subjective intent if such evidence is available when the qualified immunity motion is being decided. And it makes little sense for officials to receive qualified immunity at or after trial, because the doctrine will do nothing to shield officials in these cases from burdens associated with litigation. It should not overtax lower courts or litigants to take account of this type of evidence when deciding qualified immunity motions.[207] Encouraging lower courts to do so would

204 Given her recent concurrence in *Wesby*, Justice Ginsburg might be sympathetic to this adjustment to qualified immunity doctrine. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part).

205 Justice Gorsuch's opinions on the Tenth Circuit suggest that he might be a vote in favor of relaxing the Court's standards for clearly established law. *See, e.g.*, A.M. v. Holmes, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting) (finding that it was clearly established that an officer could not arrest a seventh grader for burping in class because prior decisions did not allow arrest for minor distractions in class, and concluding he "would have thought this authority sufficient to alert any reasonable officer . . . that arresting a now compliant class clown for burping was going a step too far"). For further predictions about Justice Gorsuch's views on qualified immunity, see Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163 (2017).

206 If it turns out that other types of government officials more regularly contribute to settlements and judgments, the Court can factor this evidence into their analysis. *See supra* note 43 and accompanying text.

207 The first type of information—regarding a jurisdiction's indemnification policies and practices—should be in the possession of the jurisdiction and could be produced in response to an interrogatory or request for admission. The second type of information—evidence of an official's subjective intent—will presumably be produced by the plaintiff in opposition to the defendant's qualified immunity motion, if it is available. Such information may not be available at the motion to dismiss stage, and so may in some cases delay qualified immunity motion practice until after some discovery, but given the infrequency with which cases are dismissed on qualified immunity grounds before discovery, and

be a first step toward more coherence between the application of qualified immunity and the justifications offered for its existence.

B. Lower Courts

If the Supreme Court continues to issue qualified immunity decisions that ignore evidence about its fundamental flaws, lower courts may need to take matters into their own hands. They have at least two tools at their disposal. First, lower courts can do what Richard Re calls "narrowing from below."[208] Re describes narrowing from below as occurring when a court interprets Supreme Court precedent "reasonably" but "more narrowly than it is best read," and describes narrowing as legitimate when precedent is "ambiguous."[209] Supreme Court qualified immunity decisions are rife with ambiguity, and lower courts can decide to read those ambiguous decisions narrowly. Indeed, Justice Thomas's concurring opinion in *Ziglar* can even be read as an invitation for lower courts to do so.[210]

For example, the Supreme Court has held that a plaintiff can defeat a qualified immunity motion by showing an obvious constitutional violation,[211] but has also suggested that plaintiffs seeking to defeat qualified immunity must point to a case from the Supreme Court so factually similar that every officer would be on notice that the conduct at issue was unconstitutional.[212] The Supreme Court has regularly reversed (and sometimes chastised) lower courts for relying on cases to clearly establish the law that are insufficiently similar to the case at hand.[213] But perhaps litigants and lower courts should rely more heavily on *Hope v. Pelzer*'s admonition that there need not be a case on point when the constitutional violation is obvious.[214] As another example, the Supreme Court has never prohibited courts deciding qualified immunity motions from considering whether the purposes of qualified immunity would be advanced in a particular case. When deciding qualified immunity motions, lower courts should therefore take into account whether the defendant bringing the motion is at any risk of personal liability or

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defendants' and judges' apparent views that qualified immunity is more appropriate at the summary judgment stage, considering evidence of officers' subjective intent would not create much of a hardship. And the third type of information—regarding the stage of litigation at which the motion is brought—will be obvious to the court and parties.

208 *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

209 *Id.* at 925–26.

210 Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (Thomas, J., concurring in part and concurring in the judgment).

211 *See* Hope v. Pelzer, 536 U.S. 730 (2002).

212 *See, e.g.*, Reichle v. Howards, 566 U.S. 658, 665–66 (2012) ("Assuming *arguendo* that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . . .").

213 *See supra* note 3 (describing some of these cases).

214 *See generally* Hope v. Pelzer, 536 U.S. 730 (2002); *see also supra* note 205 (suggesting Justice Gorsuch might be sympathetic to this argument in some cases).

whether granting the motion would shield the defendant from discovery or trial.

Judges additionally have significant discretion to manage qualified immunity litigation practice in their courts and can do so in ways that address some of the concerns I have raised. When defendants file frivolous interlocutory appeals of qualified immunity denials, district courts should certify the appeals as frivolous and refuse to stay the cases.[215] When defendants file nonfrivolous interlocutory appeals of qualified immunity denials, circuit courts should make every effort to decide those appeals quickly. District court judges can require premotion conferences as part of their individual rules, and can discourage defendants from filing meritless qualified immunity motions that will increase costs and delay. District and circuit courts' rulings on qualified immunity motions can answer whether there was an underlying constitutional violation to assist in the development and articulation of constitutional principles, or explain why they are declining to do so.[216] None of these adjustments strike qualified immunity to the core, but are small steps that lower courts can take while waiting for the Supreme Court to make things right.

CONCLUSION

Qualified immunity doctrine is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law. Scholarly defenses of the doctrine are similarly unpersuasive. The Court should not feel constrained by stare decisis given the questionable foundations of the doctrine and the liberty the Court has taken with its scope and structure over the fifty years of its existence. And there are many ways, short of downright repeal, that the Court could adjust the doctrine to better reflect its role in constitutional litigation. The key question, thus far unanswered, is whether the Court will answer these calls for reform.

Justice Thomas's concurrence in *Ziglar* offered some hope that the Court might soon take up these fundamental questions about qualified immunity. But the Court's next qualified immunity decision, in *Wesby v. District of Columbia*, suggests that we should not hold our collective breath for the Court to take action. Just six months after Justice Thomas critiqued qualified immunity in his concurrence in *Ziglar*, his opinion in *Wesby* dutifully applied the doctrine without comment or critique.[217] Despite concerns about qualified immunity previously raised in opinions authored or joined by a majority of the Court—Justices Breyer, Ginsburg, Kennedy, and Sotomayor, as well as Thomas—the Court was unanimous in its conclusion that the officers were

215 For one such decision relying in part on evidence about qualified immunity's role in constitutional litigation, see Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816 (N.D. Ohio Dec. 6, 2017).

216 *See* Blum, *supra* note 119, at 1894–96 (offering this same suggestion).

217 District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

entitled to qualified immunity.[218] Justice Thomas made no mention of his concerns that the doctrine looks nothing like the doctrine did in 1871, or that it is being used to advance the Court's "freewheeling policy choices."[219]

What explains the Court's continued, vigorous application of qualified immunity? It may be simply that the questions that Justice Thomas raised in *Ziglar* about qualified immunity were not briefed or argued by the parties in *Wesby*,[220] and the Court wants a fuller record with which to reassess the doctrine. If so, the Court will not have to wait very long. The Cato Institute has begun what it calls a "campaign to challenge and roll back qualified immunity" drawing on "the law and history of the doctrine, its effect on civil rights litigation, and the implications for police accountability."[221] And plaintiffs' attorneys have been invoking Justice Thomas's language in *Ziglar* in their petitions for writs of certiorari to the United States Supreme Court.[222] If even three Justices agree with Justice Thomas that qualified immunity doctrine should be reconsidered, the Court could grant one of these petitions and could direct the parties to address questions about the doctrine's common-law foundations, policy goals, and effects on government accountability in their briefs.

If the Court continues not to reconsider qualified immunity—despite all available evidence about the doctrine's failures, and periodic grumbling by various Justices about those failures—then something else must be at play. Perhaps the Court's continued application of qualified immunity reflects the

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218 *Id.*

219 Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (quoting Rehberg v. Paulk, 132 S. Ct. 1497, 1502 (2012)).

220 Note, however, that the ACLU did raise these arguments in its amicus brief in *Wesby*. *See* Brief of the American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia as Amici Curiae in Support of Respondents, District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (No. 15-1485), 2017 WL 3098276.

221 *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, CATO INST. (Mar. 1, 2018), https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability.

222 *See, e.g.*, Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit, Shafer v. Padilla, No. 17-1396, 2018 WL 1705603 (Apr. 3, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit, Apodaca v. Raemisch, 2018 WL 1315085 (Mar. 9, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit, Melton v. Phillips, No. 17-1095, 2018 WL 722531 (Feb. 2, 2018); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit, Noonan v. Cty. of Oakland, No. 17-473, 2017 WL 4386875 (Sept. 27, 2017); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit, Doe v. Olson, No. 17-296, 2017 WL 3701814 (Aug. 23, 2017); Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit, Walker v. Farnan, No. 17-53, 2017 WL 2954392 (July 10, 2017); *see also* Brief in Opposition to Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit, S.C. Dep't of Corr. v. Booker, No. 17-307, 2017 WL 5714616, at 34 (Nov. 21, 2017) (arguing in opposition to a grant of certiorari but stating that "if the Court decides to grant certiorari it should add a question presented permitting it to revisit the doctrine of qualified immunity as a potential alternate ground for affirmance").

Court's hostility to plaintiffs more generally. Arthur Miller and Ninth Circuit Judge Stephen Reinhardt, among others, have argued that the Court's qualified immunity decisions should be understood as one of many procedural barriers erected or strengthened by the Roberts Court—including habeas corpus, civil pleading rules, and class certification requirements—in the name of protecting government and business defendants from burdens of litigation.[223] Although this theory might explain the votes of some of the Justices, I do not believe it fully explains the Court's qualified immunity jurisprudence. Several of the Court's opinions limiting plaintiffs' access to the courts through pleading, class certification, and arbitration restrictions have been hotly contested, resulting in 5–4 decisions with powerful dissents.[224] But the four Justices dissenting in *Iqbal*, *Wal-Mart*, and *Concepcion* have joined many of the Court's qualified immunity decisions without raising these same types of concerns.[225] I agree that qualified immunity functions much like these other procedural barriers, that each is justified by interests in protecting defendants from burdensome litigation, that each impedes plaintiffs' access to the courts, and that each frustrates adjudication of the merits of plaintiffs' claims. But it appears that some or all of the Justices either do not see qualified immunity doctrine in this way, or believe that qualified immunity properly protects government defendants at plaintiffs' expense.

My best guess is that members of the Court are reluctant to modify or eliminate qualified immunity doctrine for fear that doing so might impact constitutional litigation or policing in some previously unforeseen way that

223 *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1222 n.10 (2015).

224 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

225 *See, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017); Taylor v. Barkes, 135 S. Ct. 2042 (2015); City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015); Carroll v. Carman, 135 S. Ct. 348 (2014); Lane v. Franks, 134 S. Ct. 2369 (2014); Wood v. Moss, 134 S. Ct. 2056 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014); Stanton v. Sims, 134 S Ct. 3 (2013); *cf.* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court for routinely summarily reversing denials of qualified immunity but rarely intervening when courts erroneously grant officers qualified immunity, and expressing concern that the Court's qualified immunity decisions "send[ ] an alarming signal to law enforcement officers and the public"); Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1282–83 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. But we rarely intervene where courts wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on 'society as a whole,' than does the erroneous denial of summary judgment in such cases." (citations omitted) (quoting *Sheehan*, 135 S. Ct. at 1774 n.3)); Mullenix v. Luna, 136 S. Ct. 305, 313 (2015) (Sotomayor, J., dissenting).

would harm "society as a whole."[226] For reasons that I will explain in future work, I do not believe such fears to have foundation.[227] Instead, I predict that eliminating qualified immunity would not significantly expand the scope of constitutional protections, dramatically increase the number of filings or awards, or otherwise open the floodgates to insubstantial claims. Moreover, indemnification and budgeting practices would continue to give government officials limited incentives to comply with the Constitution. This is not to say that eliminating qualified immunity would not impact constitutional litigation. To the contrary, I believe eliminating qualified immunity would have important benefits: it would clarify the law, reduce the costs and complexity of litigation, and shift the focus of Section 1983 litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority. The Court might not find these predictions to be convincing. But it cannot justify such a significant defense based on some sense in the air about how constitutional litigation or policing might be different in qualified immunity's absence.

A few years ago, Justice Anthony Kennedy gave a speech in which he observed: "To re-examine your premise is not a sign of weakness of your judicial philosophy. It's a sign of fidelity to your judicial oath."[228] I hope that Justice Kennedy and his colleagues, taking these words to heart, will agree to reexamine the premises underlying qualified immunity. And I hope that, when they do, they take the dramatic action that is compelled by the record.

226 *White*, 137 S. Ct. at 551 (quoting *Sheehan*, 135 S. Ct. at 1774 n.3); *accord* Samuel R. Bagenstos, *Who Is Responsible for the Stealth Assault on Civil Rights?*, 114 MICH. L. REV. 893, 911 (2016) (reviewing SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015)) (suggesting that liberal Justices' sympathy for qualified immunity may be an outgrowth of a "New Democrat" tough-on-crime ideology).

227 *See generally* Schwartz, *supra* note 18.

228 Mark Sherman, *Justice: Changing Course on the Bench Is Not Weakness*, SEATTLE TIMES (Sept. 23, 2016), https://www.seattletimes.com/nation-world/nation-politics/justice-changing-course-on-the-bench-is-not-weakness/.

APPENDIX

This Appendix sets out the holdings in the cases in Nielson and Walker's study[229] in which courts of appeals found a constitutional violation but granted qualified immunity because the right was not clearly established.

Case	**Holding**
Akrawi v. Remillet, 504 F. App'x 450 (6th Cir. 2012).	Finding that Michigan Parole Board's decision to put plaintiff back on parole without a hearing violated his due process rights, and awarding plaintiff injunctive relief, but affirming the district court's decision to grant officials qualified immunity. Although the Supreme Court established in 1972 that there is a due process right to a hearing before being returned to prison for a parole violation, it was not clearly established that the return to parole constitutes a "grievous loss" deserving of procedural protections.
Amore v. Novarro, 610 F.3d 155 (2d. Cir. 2010), *amended and superseded by* 624 F.3d 522 (2d Cir. 2010).	Finding that plaintiff's Fourth Amendment rights were violated when officer arrested him under New York Penal Law Section 240.35(3) because the statute had been ruled unconstitutional by the New York Court of Appeals eighteen years before, but reversing the district court's denial of qualified immunity because the State of New York had not formally repealed section 240.35(3) at the time of plaintiff's arrest.
Ass'n for Los Angeles Deputy Sheriffs v. County of Los Angeles, 648 F.3d 986 (9th Cir. 2011).	Finding that current and former deputy sheriffs had stated a claim that their due process rights were violated because the deputies—who had been charged with felonies, suspended, reinstated after suspension, and then discharged—were not afforded postsuspension hearings, but finding the Civil Service Commissioners were entitled to qualified immunity because, based on a California Court of Appeals decision, they "would have believed that denying jurisdiction over the appeals of retired deputies was lawful." (Note that the Ninth Circuit denied qualified immunity to the County Supervisors and Sheriff, who should have provided an alternative hearing for the retired employees.)

229 Nielson & Walker, *supra* note 117.

Case	Holding
Bryan v. MacPherson, 608 F.3d 614 (9th Cir. 2010), *withdrawn and superseded by* 630 F.3d 805 (9th Cir. 2010).	Finding that, taking the facts in the light most favorable to the plaintiff, an officer violated the Fourth Amendment when he used a Taser against a plaintiff who "was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist or attempt to flee, but was standing inert twenty to twenty-five feet away from the officer," yet holding defendants were entitled to qualified immunity because the Ninth Circuit had not previously established that Tasers constitute an "intermediate, significant level of force that must be justified by the government interest involved."
Burke v. County of Alameda, 586 F.3d 725 (9th Cir. 2009).	Finding that, taking the facts in the light most favorable to the plaintiff, defendants violated plaintiff's constitutional right of familial association by putting his daughter into protective custody without first contacting him to see whether she could be put in his care, but holding defendants were entitled to qualified immunity because it was not clearly established that noncustodial parents had a protected interest in the custody and management of their children.
Burns v. Pa. Dep't of Corrections, 642 F.3d 163 (3d Cir. 2011).	Finding that plaintiff's due process rights were violated when his inmate account was assessed—but not deducted—without considering available evidence "to determine its relevance and suitability for use at a disciplinary hearing," but finding that defendants were entitled to qualified immunity. Although it was established at the time of the action that procedural due process rights protected an inmate's account from being debited, it was not clearly established that these rights attached before an inmate's account was assessed.
Castle v. Appalachian Tech. Coll., 627 F.3d 1366 (11th Cir. 2010), *vacated and superseded by* 631 F.3d 1994 (11th Cir. 2011).	Finding that plaintiff's due process rights were violated when she was not offered a predeprivation hearing before being suspended from a nursing program, but affirming the lower court's grant of qualified immunity because of "the complicated factual issues surrounding the investigation of [plaintiff's] conduct" and because "the administrators made known to [plaintiff] that she could immediately appeal their determination, which [plaintiff] did within a few days."

Case	Holding
Chambers v. Pennycook, 641 F.3d 898 (8th Cir. 2011).	Taking the facts in the light most favorable to the plaintiff, his constitutional rights were violated when a police officer "kicked him several times on both sides of his body, although he was restrained on the ground and offering no resistance," another officer "repeatedly choked and kicked him during the trip to the hospital," and a third officer "extended the journey by taking a roundabout route and intentionally driving so erratically that [plaintiff] was jerked roughly back and forth in his car seat while his head was positioned adjacent to the dashboard," but finding defendants were entitled to qualified immunity because it was not clearly established in the Eighth Circuit that plaintiffs could recover under the Fourth Amendment for *de minimus* injuries.
Coates v. Powell, 639 F.3d 471 (8th Cir. 2011).	Finding that defendant officer violated plaintiff's Fourth Amendment rights by remaining in the plaintiff's house for ten to fifteen minutes after consent was revoked, but finding defendant was entitled to qualified immunity because "it was not clearly established at the time of this incident that an officer was required to leave a private home in the middle of a child neglect investigation."
Concepción Chaparro v. Ruiz-Hernández, 607 F.3d 261 (1st Cir. 2010).	Affirming district court decision that former employees, whose employment was terminated five months shy of the expiration of their one-year contracts with the municipality, had a reasonable expectation of continued employment with the municipality, but finding that officers who fired them were entitled to qualified immunity because Puerto Rico law was unclear as to whether employees had any rights to continued employment once funding for their positions ended.
Cordova v. Aragon, 569 F.3d 1183 (10th Cir. 2009).	Taking facts in the light most favorable to the plaintiff, officer violated decedent's constitutional rights by shooting him in the back of the head as he was driving away—the decedent was driving recklessly and was attempting to ram police cars, but no other motorists were in the vicinity and the officer was not in danger—but finding the officer was entitled to qualified immunity because "[t]he law in our circuit and elsewhere has been vague on whether the potential risk to unknown third parties is sufficient to justify the use of force nearly certain to cause death."

Case	Holding
Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101 (9th Cir. 2010).	Finding that plaintiff "had a Fourteenth Amendment due process right to be free from deliberately fabricated evidence in a civil child abuse proceeding" but finding defendants were entitled to qualified immunity because that right was not clearly established in the civil context (though it had been clearly established in criminal child abuse proceedings).
Decotiis v. Whittemore, 635 F.3d 22 (1st Cir. 2011).	"Allegations that speech therapist was speaking as a citizen, rather than in her capacity as a speech and language therapist when providing information to clients' parents about advocacy groups and urging them to contact the groups" was sufficient to state a First Amendment retaliation claim, but finding defendants were entitled to qualified immunity because, at the time of the alleged retaliatory action, "[t]here was no decision in this circuit explaining the scope of a public employee's employment duties and what it means to speak pursuant to those duties, nor was there a body of decisions from other circuits that could be said to have put [defendant] on clear notice. Even though the broad constitutional rule . . . may have been clearly established, the contours of the right were still cloudy."
Delia v. City of Rialto, 621 F.3d 1069 (9th Cir. 2010), *rev'd on other grounds* Filarsky v. Delia, 566 U.S. 377 (2012).	Finding that plaintiff's participation in "internal affairs investigation into his off-duty activities was coerced by direct threat of sanctions and not voluntary, and therefore, violated the Fourth Amendment," but finding the defendants were entitled to qualified immunity because "[t]his case does not fit neatly into any previous category of Fourth Amendment law."
Doe *ex rel.* Johnson v. South Carolina Dep't of Soc. Servs., 597 F.3d 163 (4th Cir. 2010).	Finding that the state violated a child's substantive due process rights when it involuntarily removed her from her home and put her a "known, dangerous" foster care placement "in deliberate indifference to her right to personal safety and security" but finding the defendant was entitled to qualified immunity because "[i]t would not have been apparent to a reasonable social worker in [defendant's] position that her actions violated the Fourteenth Amendment."

Case	Holding
Doe *ex rel.* Magee v. Covington Cty. Sch. Dist., 649 F.3d 335 (5th Cir. 2011), *reh'g en banc* 675 F.3d 849 (5th Cir. 2012).	Finding that public elementary school had violated nine-year-old child's substantive due process rights by allowing an adult male claiming to be her father to take her off school grounds without verifying the adult's identity, but finding that defendants were entitled to qualified immunity because the Fifth Circuit "ha[s] not expressly held that a very young child in the custody of a compulsory-attendance public elementary school is necessarily in a special relationship with that school when it places her in the absolute custody of an unauthorized private actor." (Note that, on rehearing en banc, the Fifth Circuit found that plaintiff had not alleged a constitutional violation).
Elkins v. District of Columbia, 690 F.3d 554 (D.C. Cir. 2012).	Finding that defendant's seizure of a notebook in the search of a home violated the Fourth Amendment when the warrant only authorized visual inspection, but finding that the defendant was entitled to qualified immunity because she was a junior member of the search team and relied on her supervisor's judgment that it was appropriate to seize the notebook.
Elwell v. Byers, 699 F.3d 1208 (10th Cir. 2012).	Finding that preadoptive foster parents' rights to due process were violated when a state agency removed foster child from their home without any advance notice, where there were no immediate concerns or emergency justifying lack of process, but finding defendants were entitled to qualified immunity because it was not clearly established that preadoptive parents possess a liberty interest in maintaining their family structure.
Escobar v. Mora, 496 F. App'x 806 (10th Cir. 2012).	Finding that plaintiff stated a claim for an Eighth Amendment violation regarding state corrections officers' allegedly spitting into his food, an event that caused him to suffer "mental and psychological distress and anguish" and lose thirty pounds, but finding that defendants were entitled to qualified immunity because "there are no controlling decisions on point" and prior decisions did not put defendants on "fair notice that their conduct rose to the level of a constitutional violation."

Case	Holding
García-Rubiera v. Calderón, 570 F.3d 442 (1st Cir. 2009).	Finding that plaintiffs stated a claim that the Governor and Secretary of Treasury violated Takings and Due Process Clauses by permanent retention of accrued interest from duplicate payments of premiums under Commonwealth's compulsory motor vehicle liability insurance law, but affirming district court's grant of qualified immunity because "the law did not clearly establish that . . . withholding any of the designed Reserve . . . [and the interest it generates] was an unconstitutional taking" and "the law was not clearly established that . . . the custodial transfer of funds pursuant to a Commonwealth statute and the provision of a compensation procedure did not comport with due process requirements."
Greene v. Camreta, 588 F.3d 1011 (9th Cir 2009), *vacated in part by* 661 F.3d 1201 (9th Cir. 2011).	Fourth Amendment rights of a child were violated when child protective services caseworker and deputy sheriff "seized and interrogated [her] in a private office at her school for two hours without a warrant, probable cause, or parental consent," but finding the right was not clearly established because prior decisions concerned children searched or seized at home, among other reasons. (Note that the decision was appealed, the Supreme Court vacated as moot the portion of the opinion addressing the Fourth Amendment issue, and so the Ninth Circuit's 2011 opinion vacated the court's decision about the Fourth Amendment.)
Harman v. Pollock, 586 F.3d 1254 (10th Cir. 2009).	Finding that officers' search of plaintiffs' apartment could not be justified by exigent circumstances, but concluding that officers were entitled to qualified immunity because "we cannot say the Officers' actions were plainly incompetent or knowing violations of the law."

Case	Holding
Henry v. Purnell, 619 F.3d 323 (4th Cir. 2010), *reh'g en banc* 652 F.3d 524 (4th Cir. 2011).	Finding that material disputes exist about the reasonableness of an officer's actions who fired his Glock instead of a Taser and failed to warn the victim before doing so, failed to utilize the laser sight, and failed to distinguish the different safety locks, but concluding that officer was entitled to qualified immunity because he would not know that "an act of weapon confusion of the firearm for the taser was 'clearly established' as an excessive use of force under the Fourth Amendment." (Note that on rehearing en banc, the Fourth Circuit reversed and found no qualified immunity.)
Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2009).	Finding that the defendant officers violated the plaintiff's Fourth Amendment rights when they arrested him following a citizen's arrest without "independent probable cause," but granting officers qualified immunity. The Ninth Circuit had previously held police officers must have independent probable cause when effectuating a municipal bus driver's citizen arrest, but it was unclear whether the same rules would apply for arrests made by a person who is not "acting as an agent of the state."
Hunt v. County of Orange, 672 F.3d 606 (9th Cir. 2012).	Finding that plaintiff's First Amendment rights were violated when he was placed on administrative leave and then demoted for campaign speech, and finding that this right was clearly established, but concluding that the defendant was entitled to qualified immunity because a reasonable official in defendant's position would not have known that the plaintiff was not a policymaker whose political loyalty was important to the effective performance of his job.
Koch v. Lockyer, 340 F. App'x 372 (9th Cir. 2009).	Finding that defendants violated plaintiff's Fourth Amendment rights when they forcibly collected his DNA without a warrant because he was not convicted of an offense that required DNA collection, but concluding that the defendant was entitled to qualified immunity; given "the complexity and novelty of the issues presented" in the case, "reasonable officials could not have understood that their actions violated Koch's constitutional rights."

Case	Holding
Kozel v. Duncan, 421 F. App'x 843 (10th Cir. 2011).	Finding that the sheriff violated plaintiffs' Fourth Amendment rights when his deputies seized patrons of a dance club "for over an hour and lined them up for sobriety checks," but concluding that the sheriff is entitled to qualified immunity. "While the proscription against warrantless 'wholesale searches and seizures' of a business open to the public is well established, it is too general to provide notice that officers violate a bar owner's constitutional rights by detaining patrons for sobriety checks after receiving reports of underage drinking in a bar with a cup policy that may facilitate underage drinking."
Melgar v. Greene, 593 F.3d 348 (4th Cir. 2010).	Finding that officer may have violated the plaintiff's Fourth Amendment rights by using a patrol dog without a muzzle and with a long lead to find a missing boy, but concluding that the defendant was entitled to qualified immunity; although there were other cases finding constitutional violations for the use of police dogs who were released from their leashes when searching for criminals, in this case the dog was kept on a leash to locate a missing person. "Cases addressing the former simply do not provide sufficient guidance to officers in the latter situation."
Moss v. Martin, 614 F.3d 707 (7th Cir. 2010).	Finding that plaintiff's First Amendment rights were violated when he was fired on the basis of his political beliefs, but concluding that the defendants were entitled to qualified immunity. Although the government cannot take most employees' political beliefs into account, there is an exception for positions involving "confidential or policymaking responsibilities." "Given the uncertainty that litigants encounter in this somewhat murky area of the law, it is difficult for a plaintiff to avoid a qualified immunity defense in a case of first impression unless she occupies a low rung on the bureaucratic ladder."
Randall v. Scott, 610 F.3d 701 (11th Cir. 2010).	Finding that plaintiff's First Amendment rights were violated when he was fired for running for political office but concluding that defendants were entitled to qualified immunity; although there is an established "constitutional right to run for office," the court was "aware of no precedential case with similar facts."

Case	Holding
Reher v. Vivo, 66 F.3d 770 (7th Cir. 2011).	Finding that officer did not have probable cause to arrest plaintiff for disorderly conduct based only on information that plaintiff had been accused of going go a park to look at and videotape children and that a crowd at the park was upset, but concluding the officer was entitled to qualified immunity because, under the circumstances, the officer "could have reasonably, but mistakenly, believed" that probable cause existed.
Rivers v. Fischer, 390 F. App'x 22 (2d Cir. 2010).	Finding that plaintiff's constitutional rights were violated when the "Department of Corrections administratively imposed a 5-year term of supervised release that was not orally pronounced by the sentencing judge," and that right was established in a 2010 case from the Second Circuit, but finding qualified immunity was appropriate because the case had not yet been decided when the sentence in this case was imposed.
Rock for Life—UMBC v. Hrabowski, 411 F. App'x 541 (4th Cir. 2010).	Finding that defendants may have violated plaintiffs' First Amendment rights by relocating their Genocide Awareness Project display, but concluding defendants were entitled to qualified immunity because it was a reasonable mistake. "If the defendants secured campus safety at too high a cost to the plaintiffs' right to free expression, we do not believe they should be made to pay for this mistake from their own pockets."
Saavedra v. Scribner, 482 F. App'x 268 (9th Cir. 2012).	Finding that a state prisoner's due process rights were violated because he got inadequate notice of the charges against him before being put into administrative segregation, and inadequate notice of subsequent disciplinary proceedings, but finding that defendants were entitled to qualified immunity "[b]ecause our cases do not give adequate guidance both regarding the level of specificity required in a . . . notice and on ensuring timely delivery" of notice of charges, and because "[i]t would not be apparent to a prison official that he needed to disclose more than [the charge and some factual basis for the charge] in a notice to initiate disciplinary proceedings, especially where a portion of the evidence used to support the disciplinary action was legitimately confidential."

Case	Holding
San Geronimo Caribe Project v. Acevedo-Vila, 650 F.3d 826 (1st Cir. 2011), *reh'g en banc*, 687 F.3d 465 (1st Cir. 2012).	Finding that developer stated a claim that his due process rights were violated when construction permits were held in abeyance for sixty days despite the fact that construction was under way, but concluding defendants were entitled to qualified immunity because prior precedent "could have led the defendants to believe that they were not required to provide a meaningful predeprivation hearing and that . . . providing postdeprivation remedies was all the process that was due." (Note that, at rehearing en banc, the First Circuit found no procedural due process violation.)
Schmidt v. Creedon, 639 F.3d 587 (3d Cir. 2011).	Finding that, taking the evidence in the light most favorable to the plaintiff, his due process rights were violated because he had a right to a hearing before being suspended from his job, but concluding defendants were entitled to qualified immunity. The Supreme Court had established that, "absent extraordinary circumstances, certain state employees were entitled to a hearing prior to termination," but "it was not clearly established in 2006 whether this rule applied when appropriate post-suspension union grievance procedures were available to suspended employees."
Schwenk v. County of Alameda, 364 F. App'x 336 (9th Cir. 2010).	Finding that mother had a legal basis to challenge the seizure of her son, based on a Ninth Circuit case decided in 2009 holding that "parents with legal custody, regardless of whether they also possess physical custody of their children have a liberty interest in the care, custody, and management of their children," but affirming the district court's dismissal of the case on qualified immunity grounds because "[a]t the time of the alleged conduct, we had not yet decided" that case.
Scott v. Fischer, 616 F.3d 100 (2d Cir. 2010).	Finding that the administrative imposition of mandatory postrelease supervision without a judicial sentence violated the plaintiff's due process rights, but concluding that qualified immunity was appropriate because the Second Circuit decision clearly establishing this right had not yet been decided when the plaintiff's sentence was imposed.

Case	Holding
Solis v. Oules, 378 F. App'x 642 (9th Cir. 2010).	Finding that defendant officer "violated [plaintiff's] Fourth Amendment right to be free from unreasonable searches and seizures when he stopped her vehicle and apparently removed her from it under a law that did not criminalize her behavior," but concluding that defendant was entitled to qualified immunity because the officer's mistake "would not have been necessarily clear to a reasonable officer under the circumstances" given "uncertainty on the face of the statute."
Stoot v. City of Everett, 582 F.3d 910 (9th Cir. 2009).	Finding that defendant officer violated juvenile's Fourth Amendment rights by seizing him and interviewing him regarding suspected child molestation but finding the officer was entitled to qualified immunity because plaintiffs "have not cited a single case squarely holding that an officer cannot rely solely on the statements of a child sexual assault victim obtained during a personal interview to establish probable cause."
Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010).	Finding that plaintiff alleged a violation of her due process rights when she was fired from her government job, but finding defendant was entitled to qualified immunity because her employment agreement was ambiguous and "it cannot be said that the defendant acted unreasonably when he interpreted the ambiguous contract one way instead of another."
Thompson v. Williams, 320 F. App'x 678 (9th Cir. 2009).	Finding that there were triable issues about whether a prison's policy not to provide the plaintiff with a Halal or Kosher diet violated his First Amendment rights or RLUIPA, but concluding that "it was not clearly established at the time of the violation" that the defendants were required to do so.

Case	Holding
Toevs v. Reid, 646 F.3d 752 (10th Cir. 2011), *amended and superseded*, 685 F.3d 903 (10th Cir. 2012).	Finding that plaintiff's due process rights were violated because he was not informed of the reasons he was recommended for or denied progression in a stratified incentive program in a prison, but concluding defendants were entitled to qualified immunity. Although the Supreme Court "clearly established that prisoners cannot be placed indefinitely in administrative segregation without receiving meaningful periodic reviews," "it was not clearly established in 2005 through 2009 that the review process was inadequate" and "this court has never considered the due-process implications of a stratified incentive program."

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How Qualified Immunity Fails

ABSTRACT. This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. Qualified immunity shields government officials from constitutional claims for money damages so long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as incredibly strong—protecting "all but the plainly incompetent or those who knowingly violate the law." Legal scholars and commentators describe qualified immunity in equally stark terms, often criticizing the doctrine for closing the courthouse doors to plaintiffs whose rights have been violated. The Court has repeatedly explained that qualified immunity must be as powerful as it is to protect government officials from burdens associated with participating in discovery and trial. Yet the Supreme Court has relied on no empirical evidence to support its assertion that qualified immunity doctrine shields government officials from these assumed burdens.

This Article is the first to test this foundational assumption underlying the Supreme Court's qualified immunity decisions. I reviewed the dockets of 1,183 Section 1983 cases filed against state and local law enforcement defendants in five federal court districts over a two-year period and measured the frequency with which qualified immunity motions were brought by defendants, granted by courts, and dispositive before discovery and trial. I found that qualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in my study, just thirty-eight (3.9%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds. And when one considers all the Section 1983 cases brought against law enforcement defendants—each of which could expose law enforcement officials to burdens associated with discovery and trial—just seven (0.6%) were dismissed at the motion to dismiss stage and thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. My findings enrich our understanding of qualified immunity's role in constitutional litigation, belie expectations about the policy interests served by qualified immunity, and show that qualified immunity doctrine should be modified to reflect its actual role in constitutional litigation.

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The original dataset used in this Article is preserved in eYLS, Yale Law School's data repository, under an embargo until the author completes future research using this data. The dataset will be available at digitalcommons.law.yale.edu/ylj.

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INTRODUCTION

The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal. The Supreme Court has long described qualified immunity doctrine as robust—protecting "all but the plainly incompetent or those who knowingly violate the law."[1] And the Court's most recent qualified immunity decisions have broadened the scope of the doctrine even further.[2] The Court has also granted a rash of petitions for certiorari in cases in which lower courts denied qualified immunity to law enforcement officers, reversing or vacating every one.[3] In these decisions, the Supreme Court has scolded lower courts for applying qualified immunity doctrine in a manner that is too favorable to plaintiffs and thus ignores the "importance of qualified immunity 'to society as a whole.'"[4] As Noah Feldman has observed, the Supreme Court's recent qualified immunity decisions have sent a clear message to lower courts: "The Supreme Court wants fewer lawsuits against police to go forward."[5] And the Court believes that qualified immunity doctrine is the way to keep the doors to the courthouse closed.

Among legal scholars and other commentators, there is a widespread belief that the Supreme Court is succeeding in its efforts. Scholars report that qualified immunity motions are raised frequently by defendants, are granted fre-

1. Malley v. Briggs, 475 U.S. 335, 341 (1986).

2. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64-65 (2016); *see also infra* note 183 and accompanying text.

3. *See* Scott Michelman, Taylor v. Barkes*: Summary Reversal Is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015, 11:17 AM), http://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend [http://perma.cc/86EN-KSLT]; *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 45), http://ssrn.com/abstract=2896508 [http://perma.cc/ZF4C-N3DR] (observing that the Supreme Court found officers violated clearly established law in just two of the twenty-nine qualified immunity cases decided by the Supreme Court since 1982). In one of its most recent qualified immunity decisions, *White v. Pauly*, the Supreme Court vacated the lower court's decision and remanded for further proceedings. But, in so doing, the Court explained that the defendant "did not violate clearly established law . . . [o]n the record described by the Court of Appeals." 137 S. Ct. 548, 552 (2017).

4. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

5. Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG VIEW (Jan. 9, 2017, 3:08 PM), http://www.bloomberg.com/view/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits [http://perma.cc/M88T-52VJ].

quently by courts, and often result in the dismissal of cases.[6] As Ninth Circuit Judge Stephen Reinhardt has written, the Supreme Court's recent qualified immunity decisions have "created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights."[7] Three of the foremost experts on Section 1983 litigation—Karen Blum, Erwin Chemerinsky, and Martin Schwartz—have concluded that recent developments in qualified immunity doctrine leave "not much *Hope* left for plaintiffs."[8]

The widespread assumption that qualified immunity provides powerful protection for government officials belies how little we know about the role qualified immunity plays in the litigation of constitutional claims.[9] The scant evidence available on this topic points in opposite directions. Studies of quali-

6. *See* Martin A. Schwartz, *Section 1983 Litigation*, FED. JUD. CTR. 143 (2014), http://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf [http://perma.cc/JMQ9-92XN] (describing qualified immunity as "the most important defense" in Section 1983 litigation, and stating that "courts decide a high percentage of Section 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity" (footnote omitted)); *see also* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.5, Westlaw (database updated Aug. 2017) ("Under *Harlow*, defendants on summary judgment motion frequently will be dismissed without a consideration of the merits."); Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012) ("Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another."); John C. Jeffries, *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in other words, to create immunity from *trial* as well as from *liability*—has been largely successful." (footnote omitted)).

7. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); *see also* Caryn J. Ackerman, Comment, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1028 (2006) (describing qualified immunity doctrine as "arguably one of the most significant obstacles for § 1983 plaintiffs").

8. Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013). *Hope* refers to *Hope v. Pelzer*, a 2002 Supreme Court decision denying qualified immunity to prison guards who had handcuffed the plaintiff to a hitching post. 536 U.S. 730 (2002). The decision is viewed as more "plaintiff friendly" than the Court's subsequent qualified immunity decisions. Blum, Chemerinsky & Schwartz, *supra*, at 654.

9. *See infra* note 57 and accompanying text (describing the lack of empirical research concerning qualified immunity litigation practice and the justifications underlying the doctrine). For research regarding other aspects of qualified immunity doctrine, see *infra* notes 10, 180.

fied immunity decisions have found that qualified immunity motions are infrequently denied, suggesting that the doctrine plays a controlling role in the resolution of many Section 1983 cases.[10] But when Alexander Reinert studied the dockets in *Bivens* actions – constitutional cases brought against federal actors – he found that grants of qualified immunity led to just 2% of case dismissals over a three-year period.[11] If qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law,"[12] and qualified immunity motions are infrequently denied, how can qualified immunity be the basis for dismissal of such a small percentage of cases?

More than descriptive accuracy is at stake in answering this question – it goes to a core justification for qualified immunity's existence. Although the concept of qualified immunity was drawn from defenses existing in the common law at the time 42 U.S.C. § 1983 was enacted, the Court has made clear that the contours of qualified immunity's protections are shaped not by the common law but instead by policy considerations.[13] In particular, the Court seeks to balance "two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[14] Since the doctrine's inception, the Court has repeatedly stated that financial liability is one of the burdens qualified immunity is intended to protect against.[15] Yet, as I showed in a prior study, law enforcement defendants are almost always indemnified and thus rarely pay anything towards settle-

10. *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (finding that qualified immunity was denied in 20% of federal cases over a two-year period); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 691 (2009) (finding that qualified immunity was denied in 14% to 32% of district court decisions); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 545 (2010) (finding that qualified immunity was denied in approximately 32% of appellate decisions).

11. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

12. Malley v. Briggs, 475 U.S. 335, 341 (1986).

13. Justice Thomas has recently criticized this approach, arguing that qualified immunity doctrine should mirror historical common law defenses. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring in part and concurring in the judgment). For a discussion of this argument, and the relevance of my findings to this argument, see *infra* note 203 and accompanying text.

14. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

15. *See infra* notes 33-36 and accompanying text.

ments and judgments entered against them.[16] Near certain and universal indemnification drastically reduces the value of qualified immunity as a protection against the burden of financial liability.

In recent years, the Court has focused increasingly on a different justification for qualified immunity: the need to protect government officials from nonfinancial burdens associated with discovery and trial.[17] This desire has arguably shaped qualified immunity more than any other policy justification for the doctrine.[18] Yet we do not know to what extent discovery and trial burden government officials, or the extent to which qualified immunity doctrine protects against those assumed burdens. Although both questions demand critical investigation, this Article focuses on the latter. Assuming that discovery and trial do impose substantial burdens on government officials, and that shielding officials from discovery and trial is a legitimate aim of qualified immunity doctrine, to what extent does qualified immunity actually achieve its intended goal?

To answer these questions, I undertook the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. I reviewed the dockets of 1,183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts—the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California.[19] I tracked several characteristics of these cases including the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, the courts' assessments of defendants' qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases' dispositions.

I found that, contrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end. Qualified immunity is raised infrequently before discovery begins: across the districts in my study, defendants raised qualified immunity in motions to dismiss in 13.9% of the cases in which they could raise the defense.[20] These motions were less frequently granted than one might expect: courts granted motions to dismiss in whole or part on qualified immunity

16. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).

17. *See infra* notes 37-41 and accompanying text.

18. *See infra* Section I.B.

19. *See infra* Part II for a description of my study design and methodology.

20. *See infra* Tables 2 & 3 and *infra* note 111 and accompanying text.

grounds 13.6% of the time.[21] Qualified immunity was raised more often by defendants at summary judgment and was more often granted by courts at that stage. But even when courts granted motions to dismiss and summary judgment motions on qualified immunity grounds, those grants did not always result in the dismissal of the cases – additional claims or defendants regularly remained and continued to expose government officials to the possibility of discovery and trial. Across the five districts in my study, just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds.[22] And when one considers all the Section 1983 cases brought against law enforcement defendants – each of which could expose law enforcement officials to whatever burdens are associated with discovery and trial – just 0.6% of cases were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds.[23]

Although courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds, there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways. The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her claims before discovery or trial.[24] Qualified immunity motion practice and interlocutory appeals of qualified immunity denials may increase the costs and delays associated with Section 1983 litigation. The challenges of qualified immunity doctrine may cause plaintiffs' attorneys to include claims in their cases that cannot be dismissed on qualified immunity grounds – claims against municipalities, claims seeking injunctive relief, and state law claims. Qualified immunity likely influences the litigation of cases against law enforcement in each of these ways. But, as my study makes clear, qualified immunity does not affect constitutional litigation against law enforcement in the way the Court expects and intends.

One should not conclude based on my findings that the Supreme Court simply needs to make qualified immunity stronger. As a preliminary matter, qualified immunity may not be well suited to weed out only insubstantial cases.[25] Moreover, my data suggest that qualified immunity is often fundamentally

21. *See infra* Table 7 (showing that qualified immunity was granted in whole in 9.1% of cases in which a qualified immunity motion was raised at the motion to dismiss stage, and was granted in part in 4.5% of such cases).

22. *See infra* Table 11 and accompanying text.

23. *See infra* Table 12 and accompanying text.

24. For further discussion of these possibilities, see *infra* notes 117-122 and accompanying text.

25. *See infra* text accompanying notes 204-205.

ill suited to dismiss filed cases, regardless of their underlying merits.[26] Although district courts recognize that they should dispose of cases as early as possible on qualified immunity grounds, plaintiffs can often plausibly plead clearly established constitutional violations and thus defeat motions to dismiss. Factual disputes regularly prevent dismissal at summary judgment. And even when courts grant qualified immunity motions, additional defendants or claims often remain that continue to expose government officials to the burdens of litigation. My data also suggest that qualified immunity is less essential than has been assumed to serve its intended protective function. The Supreme Court suggests in its opinions that qualified immunity is the only barrier standing between government officials and the burdens of discovery and trial. Instead, my study shows that litigants and courts have a wide range of tools at their disposal to resolve Section 1983 cases.

One also should not conclude based on my findings that qualified immunity is more benign than has been assumed. My findings do show that Section 1983 claims against the police are infrequently dismissed on qualified immunity grounds. But qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith.[27] The fact that few cases are dismissed on qualified immunity grounds does not fundamentally undermine these critiques.

Qualified immunity doctrine is intended by the Court to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly."[28] Were qualified immunity reliably insulating government officials from the burdens of litigation in insubstantial cases, one could argue that the doctrine's incoherence, illogic, and overprotection of government officials were unfortunate but necessary to further government interests. Yet available evidence suggests that qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and ill suited to shield government officials from discovery and trial in most filed cases. Qualified immunity may, in fact, increase the costs and delays associated with constitutional litigation. Qualified immunity might benefit the government in other ways, and further

26. *See infra* notes 136-138 and accompanying text.

27. For a discussion of these critiques, see *infra* notes 176-185 and accompanying text.

28. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

research is necessary to explore this possibility.[29] But the evidence now available weakens the Court's current justifications for the doctrine's structure and highly restrictive standards. The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.[30] Given my findings, it is high time for the Supreme Court to reconsider that balance.

The remainder of the Article proceeds as follows. Part I describes the Supreme Court's assumptions about the burdens of discovery and trial for government officials, and the ways in which these assumptions have shaped qualified immunity doctrine. In Part II, I describe the methodology of my study. In Part III, I set forth my findings about the frequency with which law enforcement defendants raise qualified immunity, the frequency with which courts grant qualified immunity, the frequency and outcome of qualified immunity interlocutory and final appeals, and the frequency with which qualified immunity disposes of plaintiffs' cases. In Part IV, I consider the implications of my findings for descriptive accounts of qualified immunity's role in constitutional litigation and expectations about the policy interests served by qualified immunity doctrine. I also suggest adjustments to qualified immunity that would create more consistency between the doctrine and its actual role in constitutional litigation.

I. QUALIFIED IMMUNITY'S EXPECTED ROLE IN CONSTITUTIONAL LITIGATION

The Supreme Court has long viewed qualified immunity as a means of protecting government officials from burdens associated with participating in discovery and trial in insubstantial cases. Indeed, the Supreme Court has justified several major developments in qualified immunity doctrine over the past thirty-five years as means of protecting government officials from these assumed burdens. In this Part, I describe the Court's stated assumptions about the purposes served by qualified immunity, the ways in which those assumptions have shaped qualified immunity doctrine, and the lack of evidence supporting the Court's concerns and interventions.

29. See *infra* notes 161-163 and accompanying text for a description of remaining questions about the way qualified immunity doctrine functions and the extent to which it achieves its intended goals.

30. Anderson v. Creighton, 483 U.S. 635, 642 n.3 (1987).

A. The Court's Concerns About the Burdens of Litigation

The Supreme Court has made clear that its qualified immunity jurisprudence reflects the Court's view about how best to balance "the importance of a damages remedy to protect the rights of citizens" against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[31] Yet the Court's descriptions of the ways in which qualified immunity protects government officials have shifted over time.

The Supreme Court's original rationale for qualified immunity was to shield officials from financial liability. The Court first announced that law enforcement officials were entitled to a qualified immunity from suits in the 1967 case of *Pierson v. Ray*.[32] That decision justified qualified immunity as a means of protecting government defendants from financial burdens when acting in good faith in legally murky areas.[33] Qualified immunity was necessary, according to the Court, because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."[34] The scope of the qualified immunity defense is in many ways consistent with an interest in protecting government officials from financial liability. For example, qualified immunity does not attach in claims against municipalities, claims against some private actors, and claims for injunctive or declaratory relief.[35] Indeed, the Court has been clear that municipalities and private prison guards are not entitled to qualified immunity in part because neither type of defendant is threatened by personal financial liability.[36]

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31. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

32. 386 U.S. 547 (1967).

33. *Id.* at 555; *see also* Wood v. Strickland, 420 U.S. 308, 319 (1975) ("Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.").

34. *Pierson*, 386 U.S. at 555.

35. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) (observing that qualified immunity is not available in "criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages"); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards are not entitled to qualified immunity); *Wood*, 420 U.S. at 315 n.6 ("[I]mmunity from damages does not ordinarily bar equitable relief as well.").

36. *See Richardson*, 521 U.S. at 411 (finding that private actors' insurance "increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear

The Supreme Court's decision in *Harlow v. Fitzgerald*, fifteen years after *Pierson*, expanded the policy goals animating qualified immunity. The Court explained in *Harlow* that qualified immunity was necessary not only to protect government officials from financial liability, but also to protect against "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[37]

In subsequent cases, the Court has focused increasingly on the need to protect government officials from burdens associated with discovery and trial, with the expectation that qualified immunity can protect government officials from those burdens. In *Mitchell v. Forsyth*, the Court reaffirmed the *Harlow* Court's conclusion that qualified immunity was necessary to protect against the burdens associated with both trial and pretrial matters, like discovery, because "'[i]nquiries of this kind can be peculiarly disruptive of effective government.'"[38] In *Ashcroft v. Iqbal*, the Court again emphasized the value of qualified immunity in curtailing the time-intensive discovery process. As the Court explained:

> The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and

of unwarranted liability potential applicants face"); Owen v. City of Independence, 445 U.S. 622, 653 (1980) (concluding that municipalities should not be protected by qualified immunity in part because concerns about overdeterrence are "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at stake"). The Court has offered little explanation why the qualified immunity defense is not available in claims for nonmonetary relief.

37. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

38. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting *Harlow*, 457 U.S. at 817).

> resources that might otherwise be directed to the proper execution of the work of the Government.[39]

In recent years, the interest in shielding government officials from the burdens of discovery and trial has taken center stage in the Court's qualified immunity calculations. In 1997, the Supreme Court made clear that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity."[40] Twelve years later, in 2009, the Court described protecting government officials from burdens associated with discovery and trial as the "'driving force' behind [the] creation of the qualified immunity doctrine."[41]

The Court's interest in protecting government officers from burdens associated with discovery and trial extends not only to defendants but to other government officials who may be required to testify, respond to discovery, or otherwise participate in litigation. In *Filarsky v. Delia*, the Court held that a private actor retained by the government to carry out its work was entitled to qualified immunity in part because the "distraction of lawsuits . . . will also often affect any public employees with whom they work by embroiling those employees in litigation."[42]

B. Doctrinal Impact of the Court's Desire To Protect Defendants from Discovery and Trial

Over the past thirty-five years, the Court's interest in protecting government officials from discovery and trial has shaped qualified immunity in several important ways. Granted, some aspects of qualified immunity doctrine are inconsistent with the Court's interest in protecting government officials from discovery and trial. After all, government officials must participate in discovery and trial in claims against municipalities – as witnesses, if not as defendants. In addition, government officials must participate in discovery and trial in claims for declaratory and injunctive relief. Yet, in the years since *Pierson*, the Court's concerns about the burdens of discovery and trial have led the Court to remove the subjective prong of the qualified immunity defense, adjust the process by which lower courts assess qualified immunity motions, and allow interlocutory appeals of qualified immunity denials.

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39. Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (citation omitted).

40. *Richardson*, 521 U.S. at 411.

41. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

42. 566 U.S. 377, 391 (2012).

1. *Defendants' State of Mind*

The Court's interest in shielding government defendants from discovery and trial underlay its decision to eliminate the subjective prong of the qualified immunity defense. From 1967, when qualified immunity was first announced by the Supreme Court, until 1982, when *Harlow* was decided, a defendant seeking qualified immunity had to show both that his conduct was objectively reasonable and that he had a "good-faith" belief that his conduct was proper.[43] In *Harlow*, the Supreme Court concluded that the subjective prong of the defense was "incompatible" with the goals of qualified immunity because an official's subjective intent often could not be resolved before trial.[44] Moreover, during discovery, gathering evidence of an official's subjective motivation "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues."[45] By eliminating the subjective prong of the qualified immunity analysis, the Court believed it could "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[46]

2. *The Order of Battle*

The Court's concerns about burdens associated with litigation also influenced its decisions regarding the manner in which courts should analyze qualified immunity. The Supreme Court believes that lower courts deciding qualified immunity motions are faced with two questions—whether a constitutional right was violated, and whether that right was clearly established. But the Court has wavered in its view regarding the order in which these questions must be answered—what is often referred to as "the order of battle." In 2001, the Supreme Court held in *Saucier v. Katz* that a court engaging in a qualified immunity analysis must first decide whether the defendant violated the plaintiff's constitutional rights and then decide whether the constitutional right was clearly established.[47] The Court insisted on this sequence because it would allow "the law's elaboration from case to case . . . . The law might be deprived of

43. *Harlow*, 457 U.S. at 815-16.

44. *Id.*

45. *Id.* at 817.

46. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting *Harlow*, 457 U.S. at 817-18).

47. 533 U.S. 194, 201 (2001).

this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."[48]

Eight years later, in *Pearson v. Callahan*, the Court reversed itself and concluded that *Saucier*'s two-step process was not mandatory.[49] In reaching this conclusion, Justice Alito, writing for the Court, relied heavily on the fact that courts considered the process mandated by *Saucier* to be unduly burdensome.[50] Justice Alito also explained that the process wasted the parties' resources, writing that "*Saucier*'s two-step protocol 'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.'"[51] Concerns about the burdens of litigation therefore led the Court to allow lower courts not to decide the first question—whether the conduct was unconstitutional—if they could grant the motion on the ground that the right was not clearly established.

3. *Interlocutory Appeals*

The Court's interest in protecting government officials from the burdens of discovery and trial also motivated its decision to allow interlocutory appeals of qualified immunity denials.[52] Generally speaking, litigants in federal court can only appeal final judgments; interlocutory appeals are not allowed unless a right "cannot be effectively vindicated after the trial has occurred."[53] The question decided by the Court in *Mitchell v. Forsyth* was whether qualified immunity should be understood as an entitlement not to stand trial that cannot be remedied by an appeal at the end of the case. In concluding that a denial of qualified immunity could be appealed immediately, the Court relied on its assertion in *Harlow* that qualified immunity was "an entitlement not to stand trial or face

48. *Id.*

49. 555 U.S. 223 (2009).

50. *Id.* at 236-37.

51. *Id.* at 237 (alteration in original) (quoting Brief of National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 30, *Pearson*, 555 U.S. 223 (No. 07-751)).

52. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). Note that a defendant can immediately appeal a decision that the law was clearly established, but cannot immediately appeal a denial of qualified immunity made on the grounds that there exists a genuine issue of fact for trial. *See* Johnson v. Jones, 515 U.S. 304, 319-20 (1995).

53. *Mitchell*, 472 U.S. at 525.

the other burdens of litigation."[54] If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants denied qualified immunity could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court concluded, qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial."[55] Only an interest in protecting officials from discovery and trial can justify this holding.

C. The Lack of Empirical Support for the Court's Concerns and Interventions

The Supreme Court's qualified immunity decisions over the past thirty-five years have relied on the assumptions that discovery and trial impose substantial burdens on government officials, and that qualified immunity can shield government officials from these burdens. Four years after it decided *Harlow*, the Court asserted that the decision had achieved the Court's goal of facilitating dismissal at summary judgment.[56] In subsequent years, the Court's repeated invocation of the burdens of discovery and trial, and repeated reliance on qualified immunity doctrine to protect defendants from those assumed burdens, suggest the Court's continued faith in these positions. Yet the Court has relied on no empirical evidence to support its views.

Scholars have decried the lack of empirical evidence about the realities of civil rights litigation relevant to questions about the proper scope of qualified immunity doctrine and the extent to which the doctrine achieves its intended purposes. Twenty years ago, Alan Chen complained that the Court and its critics make assertions about the role of qualified immunity in constitutional litigation without evidence to support their claims.[57] Although scholars have em-

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54. *Id.* at 526.

55. *Id.*

56. *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and *we believe it sufficiently serves this goal*." (emphasis added)). Scholars appear to agree. *See supra* note 6 and accompanying text.

57. Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997) ("Presently, there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics. While the Court has consistently hypothesized that significant social costs are engendered by § 1983 and *Bivens* litigation against individual government officials, it has never relied on empirical data concerning the impact of constitutional tort litigation on officials' actual behavior. Similarly, while other commentators also have observed that qualified immunity liti-

pirically examined some questions about qualified immunity—paying particular attention to the impact of *Pearson* on the development of constitutional law—the same is largely true today.[58] As Richard Fallon has observed, "[W]e could make far better judgments of how well qualified immunity serves the function of getting the right balance between deterrence of constitutional violations and chill of conscientious official action if we had better empirical information."[59] This Article, and my research more generally, aims to fill that gap.

II. STUDY METHODOLOGY

To evaluate the role that qualified immunity plays in the litigation of Section 1983 suits, I reviewed the dockets of cases filed from January 1, 2011 to December 31, 2012 in five districts: the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Eastern District of Pennsylvania, and Northern District of California. Several considerations led me to study these five districts.

I chose to look at decisions from district courts in the Third, Fifth, Sixth, Ninth, and Eleventh Circuits because I expected that judges from these circuits might differ in their approach to qualified immunity and to Section 1983 litigation more generally. This expectation was based on my review of district court qualified immunity decisions from each of the circuits, as well as a view, shared by others, that judges in these circuits range from conservative to more liberal.[60] Moreover, commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh Circuit so hostile to Section 1983 cases that they are described as applying "*un*qualified immunity."[61]

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gation may generate substantial social costs, they have offered no supporting empirical data either." (footnotes omitted)).

58. *See supra* notes 10-12 and *infra* notes 179-180 and accompanying text.

59. Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 500 (2011).

60. *See, e.g.*, Reinert, *supra* note 11, at 832 n.126 (citing Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 312 fig.4 (2007)).

61. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 n.151 (2013) (quoting Elizabeth J. Normal & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002)); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (citation omitted)); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2000) (describing the Eleventh Circuit as having a very restrictive view and

I chose these five districts within these five circuits for two reasons. First, I expected that these five districts would have a large number of cases to review: from 2011 to 2012, these districts were among the busiest in the country, as measured by case filings.[62] Second, these five districts have a range of small, medium, and large law enforcement agencies and agencies of comparable sizes.[63]

I chose to review dockets instead of relying on the most obvious alternative—decisions available on Westlaw.[64] Although Westlaw can quickly sort out decisions in which qualified immunity is addressed by district courts, Westlaw could not capture information essential to my analysis about the frequency with which qualified immunity protects government officials from discovery and trial. First, a Westlaw search could capture no information about the number of cases in which qualified immunity was never raised. In addition, a Westlaw search could not capture information about the number of cases in which qualified immunity was raised by the defendant in his motion but was not addressed by the court in its decision. Even when a defendant raises a qualified immunity defense and the district court addresses qualified immunity in its decision, the decision may not appear on Westlaw—Westlaw does not capture motions resolved without a written opinion, and includes only those opinions that are selected to appear on the service.[65] In other words, opinions on

other circuits, including the Third Circuit, as having a broader view of what constitutes "clearly established" law).

62. *See Judicial Facts and Figures*, ADMIN. OFF. U.S. CTS. tbl.4.2 (Sept. 30, 2012), http://www.uscourts.gov/sites/default/files/statistics_import_dir/Table402_6.pdf [http://perma.cc/697A-JWVH].

63. For example, the Philadelphia and Houston Police Departments are both large, with between 5,000 and 7,000 officers; the Cleveland Police Department, San Francisco Police Department, and Jacksonville Sheriff's Office are midsized, with between 1,600 and 2,000 officers; the Orlando Police Department and Oakland Police Department each have between 750 and 800 officers; and all five districts have smaller agencies. *See* Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT'L ARCHIVE CRIM. JUST. DATA (2008) [hereinafter *BJS Law Enforcement Census Data*], http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681 [http://perma.cc/MLQ3-W2AH].

64. Most empirical studies examining qualified immunity have relied on decisions available on Westlaw. *See* sources cited *supra* note 10 and *infra* note 180. One notable exception is Alexander Reinert's study of *Bivens* dockets. *See* Reinert, *supra* note 11, at 834.

65. Relying on Westlaw would have significantly reduced the number of qualified immunity opinions in my dataset. There are a total of 365 district court decisions on motions raising qualified immunity in my dataset. *See infra* Table 6. I searched on Westlaw for each of the 365 qualified immunity decisions I found on Bloomberg Law, and 178 (48.8%) of those decisions were available on Westlaw. Nineteen of fifty-six decisions (33.9%) on qualified immunity motions from the Southern District of Texas were available on Westlaw; forty-one of ninety-one (45.1%) decisions on qualified immunity motions from the Middle District of

Westlaw can offer insights about the ways in which district courts assess qualified immunity when they choose to address the issue in a written opinion and the opinion is accessible on Westlaw, but can say little about the frequency with which qualified immunity is raised, the manner in which all motions raising qualified immunity are decided, and the impact of qualified immunity on case dispositions.

I reviewed the dockets of cases filed in 2011 and 2012 in the five districts in my study.[66] I searched case filings in the five districts in my study through Bloomberg Law, an online service that has dockets otherwise available through PACER and additionally provides access to documents submitted to the court—complaints, motions, orders, and other papers.[67] Within Bloomberg Law, I limited my search to those cases that plaintiffs had designated under the broad term "Other Civil Rights," nature-of-suit code 440.[68] This search generated 462 dockets in the Southern District of Texas, 465 dockets in the Northern District of Ohio, 674 dockets in the Middle District of Florida, 712 dockets in

Florida were available on Westlaw; thirty-seven of sixty-one (60.7%) decisions on qualified immunity motions from the Northern District of Ohio; forty-six of seventy-six (60.5%) decisions on qualified immunity motions from the Northern District of California; and thirty-five of eighty-one (43.2%) decisions on qualified immunity motions from the Eastern District of Pennsylvania. *Cf.* David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (finding that only 3% of all district court orders appear on Westlaw).

66. I chose this two-year period because it is a recent period in which most (if not all) cases have been resolved by the time of this Article's publication.

67. *See* E-mail from Tania Wilson, Bloomberg BNA Law Sch. Relationship Manager, W. Coast, to Kelly Leong, Reference Librarian, UCLA Sch. of Law (July 8, 2016, 12:18 PM) (on file with author) ("[Bloomberg Law] ha[s] everything on PACER. We are also able to obtain docket sheets and documents via courier retrieval (which would fill in the gap of some cases not available electronically).").

68. Every complainant in federal court must choose from various "Nature of Suit" codes on the "Civil Cover Sheet," also known as Form JS 44. *See* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 452 & n.71 (2006). Code 440 designates "Other Civil Rights" actions, excluding specific categories related to voting, employment, housing, disabilities, and education. The official description for Code 440 offers, as an example, an "[a]ction alleging excessive force by police incident to an arrest." *Civil Nature of Suit Code Descriptions*, U.S. CTS. (Aug. 2016), http://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [http://perma.cc/F8A2-7H7T]. It is possible that some plaintiffs in Section 1983 cases against state and local law enforcement did not choose Code 440. Code 550, for example, is titled "Prisoner Petitions–Civil Rights," but its proper use is limited to suits "alleging a civil rights violation by corrections officials." *Id.* Bloomberg Law separately allows users to filter using the "Cause of Action" field on the Civil Cover Sheet. But that field does not impose a limited set of options on complainants, and I found that many Section 1983 cases were not correctly designated. Accordingly, I used the nature-of-suit search.

the Northern District of California, and 1,435 dockets in the Eastern District of Pennsylvania. I reviewed the complaints associated with these 3,748 dockets and included in my dataset those cases, brought by civilians, alleging constitutional violations by state and local law enforcement agencies and their employees.[69]

I limited my study to cases brought by civilians against law enforcement defendants for several reasons. First, many of the Supreme Court's qualified immunity decisions have involved cases brought against law enforcement. Of the twenty-nine qualified immunity cases that the Supreme Court has decided since 1982, almost half have involved constitutional claims against state and local law enforcement.[70] Because the Court has developed qualified immunity doctrine (and articulated its underlying purposes) primarily in cases involving law enforcement, it makes sense to examine whether the doctrine is meeting its express goals in these types of cases.

Limiting my study to Section 1983 cases against state and local law enforcement also creates some substantive consistency across the cases in my dataset. Most Section 1983 cases against state and local law enforcement allege Fourth Amendment violations – excessive force, false arrest, and wrongful searches – and, less frequently, First and Fourteenth Amendment violations. Restricting my study to suits by civilians against state and local law enforcement facilitates direct comparison of outcomes in similar cases across the five districts in my study. Finally, much of my own prior research has focused on lawsuits against state and local law enforcement, and maintaining this focus here allows for future synthesis of my findings.[71]

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69. I limited my study to state and local law enforcement agencies identified in the Bureau of Justice Statistics' *Census of State and Local Law Enforcement Agencies*. *See BJS Law Enforcement Census Data*, *supra* note 63. I excluded decisions involving other types of government officials, including some government officials that perform law enforcement functions, like law enforcement employed by school districts, state correctional officers, and federal law enforcement. I have additionally excluded Section 1983 actions brought by law enforcement officials as plaintiffs. Finally, I removed duplicate filings, cases that were consolidated, and cases that were improperly brought against law enforcement agencies located outside of the five districts.

70. *See* Baude, *supra* note 3, at 45. In the remaining fifteen cases, two alleged constitutional violations by state corrections officials, nine alleged constitutional violations by federal law enforcement, and four asserted constitutional claims against government officials not involved in the criminal justice system. *See id.*

71. *See, e.g.*, Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010); Schwartz, *supra* note 16; Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012) [hereinafter Schwartz, *What Police Learn*].

The resulting dataset includes a total of 1,183 cases from these five districts: 131 cases from the Southern District of Texas, 225 cases from the Middle District of Florida, 172 cases from the Northern District of Ohio, 248 cases from the Northern District of California, and 407 cases from the Eastern District of Pennsylvania. For each of these dockets, I tracked multiple pieces of information relevant to this study, including whether the plaintiff(s) sued individual officers and/or the municipality, the relief sought by the plaintiff(s), whether the law enforcement defendant(s) filed one or more motions to dismiss on the pleadings or for summary judgment, whether and when the defendant(s) raised qualified immunity, how the court decided the motions raised by the defendant(s), whether there was an interlocutory or final appeal of a qualified immunity decision, and how the case was ultimately resolved.[72] Although some of this information was available from the docket sheet, I obtained much of the information by reading motions and opinions linked to the dockets on Bloomberg Law.

Although some of my coding decisions were straightforward, others involved less obvious choices. Because my coding decisions may make most sense when reviewed in context, I have described those decisions in detail in the footnotes accompanying the data.[73] Throughout, my coding decisions were guided by my focus on the role that qualified immunity played in the resolution of cases and the frequency with which the doctrine meets its goal of shielding government officials from discovery and trial.

My dataset is comprehensive in the five chosen districts. It includes most—if not all—Section 1983 cases filed by civilians against state and local law enforcement in these federal districts over a two-year period, and it offers insights about how frequently qualified immunity is raised in these cases, how courts decide these motions, and how the cases are resolved. There are, however, several limitations of the data. First, although I selected these five districts in part to capture regional variation, they may not represent the full range of court and litigant behavior nationwide. The marked differences in my data across districts do, however, suggest a considerable degree of regional variation. Second, the data offer no information about the role of qualified immunity in state

72. I tracked additional information as well, including whether the plaintiff was represented, the attorneys involved in the cases, and the law enforcement agencies implicated in the cases. These data are relevant to subsequent related projects I intend to undertake and are not reported in this Article.

73. For descriptions of my coding decisions, see, for example, *infra* notes 82, 87, 88, 91, 93, 98.

court litigation. This is in part because Bloomberg Law does not offer much information about the litigation of constitutional cases in state courts.[74]

Third, although this study sheds light on the litigation of constitutional claims against state and local law enforcement officers, it does not necessarily describe the role qualified immunity plays in the litigation of constitutional claims against other types of government employees. It may be that the types of constitutional claims often raised in cases against law enforcement – Fourth Amendment claims alleging excessive force, unlawful arrests, and improper searches – are particularly difficult to resolve on qualified immunity grounds in advance of trial. Fourth Amendment claims may be comparatively easy to plead in a plausible manner (and so could survive a motion to dismiss), and such claims may be particularly prone to factual disputes (making resolution at summary judgment difficult). If so, perhaps qualified immunity motions in cases raising other types of claims would be more successful. On the other hand, John Jeffries has argued that it may be particularly difficult to clearly establish that a use of force violates the Fourth Amendment because Fourth Amendment analysis requires a fact-specific inquiry about the nature of the force used and the threat posed by the person against whom force was used, viewed from the perspective of an officer on the scene.[75] Further research should explore whether qualified immunity plays a different role in cases brought against other government actors, or cases alleging different types of constitutional violations.

Fourth, qualified immunity may be influencing the litigation of constitutional claims in ways that cannot be measured through the examination of case

74. I looked at state court dockets available on Bloomberg Law for counties in the Northern District of California and found that very few had any information about motions filed (in the instances that they were not removed to federal court). In addition, federal constitutional cases filed in state court are at least sometimes removed to federal court. In the Northern District of California, fifty-five of the 248 cases filed during the study period – 22.2% – were initially filed in state court and removed to federal court. In the Northern District of Ohio, fifty-nine of the cases were removed from state court, which constitutes 34.3% of the 172 cases filed in federal district court over those two years. In the Southern District of Texas, twenty-seven cases were removed from state court, amounting to 20.6% of the 131 total filings in federal district court. In the Eastern District of Pennsylvania, sixty-three of the cases were removed from state court, which constitutes 15.5% of the 407 cases filed in federal court over these two years. In the Middle District of Florida, sixty of the cases were removed from state court, which constitutes 26.7% of the 225 cases filed in federal court over these two years. Of course, these figures do not capture how many cases were filed in state court but were not removed.

75. *See* Jeffries, *supra* note 6, at 859-61.

dockets.[76] For example, my study does not measure how frequently qualified immunity causes people not to file lawsuits. It also does not capture information about the frequency with which plaintiffs' decisions to settle or withdraw their claims are influenced by the threat of a qualified immunity motion or decision. Exploration of these issues is critical to a complete understanding of the role qualified immunity plays in constitutional litigation. I discuss these issues in more depth in Part IV, and future research should explore these questions.[77] Yet this Article illuminates several important aspects of qualified immunity's role in Section 1983 cases. Moreover, by measuring the frequency with which qualified immunity motions are raised, granted, and dispositive, this Article reveals the extent to which the doctrine functions as the Supreme Court expects and critics fear.

III. FINDINGS

The Supreme Court has explained that a goal of qualified immunity is to "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[78] Logically, qualified immunity will only achieve this goal in a case if four conditions are met.

First, the case must be brought against an individual officer and must seek monetary damages. Qualified immunity is not available for claims against municipalities or claims for noneconomic relief. Second, the defendant must raise the qualified immunity defense early enough in the litigation that it can protect him from discovery or trial. If the defendant seeks to protect himself from discovery, he must raise qualified immunity in a motion to dismiss or a motion for judgment on the pleadings; if a defendant seeks to protect himself from trial, he can raise qualified immunity at the pleadings or at summary judgment.[79]

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76. For further discussion of these remaining questions about the role of qualified immunity in constitutional litigation, see *infra* text accompanying notes 118-122.

77. *See infra* notes 162-163 and accompanying text.

78. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)).

79. In some instances, motions for summary judgment may be made before the parties have engaged in full-fledged discovery, either because the parties will attach documentary evidence to their Rule 12 motion and the court will convert the motion to one for summary judgment, or because the parties will engage in partial discovery sufficient only to address the qualified immunity question. For further discussion of the frequency with which defendants in my

Third, for a qualified immunity motion to protect government officials against burdens associated with discovery or trial, the court must grant the motion on qualified immunity grounds.[80] Finally, the grant of qualified immunity must completely resolve the case. If qualified immunity is granted for an officer on one claim but not another, that officer will continue to have to participate in the litigation of the case. Even when a grant of qualified immunity results in the dismissal of all claims against a defendant, that defendant may still have to participate in the litigation of claims against other defendants. To be sure, the government official who has been dismissed from the case may no longer feel the same psychological burdens associated with the litigation and may have lesser discovery burdens than he would have had as a defendant. But the grant of qualified immunity will not necessarily shield him from the burdens of participating in discovery and trial.

This Part describes my findings regarding the frequency with which each of these conditions is met. I empirically examine six topics: (1) the number of cases in which qualified immunity can be raised by defendants; (2) the number of cases in which defendants choose to raise qualified immunity; (3) the stage(s) of litigation at which defendants raise qualified immunity; (4) the ways in which district courts decide qualified immunity motions; (5) the frequency and outcome of qualified immunity appeals; and (6) the frequency with which qualified immunity is the reason that a case ends before discovery or trial.

My findings regarding these six topics show that, at least in filed cases, qualified immunity rarely functions as expected. Qualified immunity could not be raised in more than 17% of the cases in my dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer or otherwise respond. Defendants raised qualified immunity in 37.6% of the cases in my dataset in which the defense could be raised. Defendants were particularly disinclined to raise qualified immunity in motions to dismiss: they did so in only 13.9% of the cases in which they could raise the defense at that stage. Courts granted (in whole or part) less than 18% of the motions that raised a qualified immunity defense. Qualified immunity was the reason for dismissal in just 3.9% of the cases in my dataset in which the defense

dataset moved for summary judgment without discovery, see *infra* note 86 and accompanying text.

80. It is possible that a court could deny a qualified immunity motion in part or whole, but the motion could nevertheless influence the courts' other rulings regarding discovery or other pretrial matters. I have not endeavored to measure these possible secondary effects of denied qualified immunity motions.

could be raised, and just 3.2% of all cases in my dataset. The remainder of this Part describes each of these findings in more detail.

A. Cases in Which Qualified Immunity Cannot Play a Role

There are certain types of cases in which qualified immunity cannot play a role. The Supreme Court has held that qualified immunity does not apply to claims against municipalities and claims for injunctive or declaratory relief.[81] Accordingly, qualified immunity cannot protect government officials from discovery or trial in cases asserting only these types of claims. In my docket dataset of 1,183 cases, ninety-nine cases (8.4%) were brought solely against municipalities and/or sought only injunctive or declaratory relief.[82]

TABLE 1.
FREQUENCY WITH WHICH QUALIFIED IMMUNITY CAN BE RAISED, IN FIVE DISTRICTS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Section 1983 cases against municipalities/seeking solely injunctive or declaratory relief	14	26	13	22	24	**99 (8.4%)**
Cases brought against individual defendants, seeking damages, but dismissed by court before defendants respond	11	44	20	7	23	**105 (8.9%)**
Section 1983 cases in which QI can be raised by defendants	106	155	139	219	360	**979 (82.8%)**
Total Section 1983 cases filed	**131**	**225**	**172**	**248**	**407**	**1,183**

81. *See supra* notes 35-36 and accompanying text.

82. In some of these instances, plaintiffs apparently intended to sue individual officers (indicated by the fact that they named Doe defendants) but were ultimately unable to identify the officers. When Doe defendants are identified in the complaint and subsequently named, I count these as cases against individual defendants; when Doe defendants are named but their true identities are never identified, I count these as cases only against the municipality, as the Doe defendants could not raise a qualified immunity defense unless they were identified. In other instances, plaintiffs might have intentionally named only the municipality.

Even when cases are brought against individual officers and seek monetary relief, there are some cases in which defendants have no need to raise qualified immunity as a defense—cases dismissed sua sponte by the court before the defendants respond to the complaint. In these cases, qualified immunity is unnecessary to protect defendants from discovery and trial. In the five districts in my docket dataset, 105 (8.9%) complaints naming individual law enforcement officers and seeking damages were dismissed sua sponte by district courts before defendants answered or responded. Most often, district courts dismissed these cases pursuant to their statutory power to review pro se plaintiffs' complaints and dismiss actions they conclude are frivolous or meritless.[83] Other cases were dismissed by the court at this preliminary stage because the plaintiffs never served the defendants or failed to prosecute the case, or because the court remanded the case to state court for lack of subject matter jurisdiction before the defendants were served or responded.

Qualified immunity can only protect government officials from discovery and trial in cases in which government defendants can raise the defense. Defendants could not raise qualified immunity in 8.4% of cases in my docket dataset because those cases did not name individual defendants and/or seek damages. Qualified immunity was unnecessary to shield government officials from discovery or trial in another 8.9% of cases in my dataset because these cases were dismissed by the district courts before defendants could raise the defense. Accordingly, defendants could raise a qualified immunity defense in a total of 979 (82.8%) of the 1,183 complaints filed in the five districts during my two-year study period.

B. Defendants' Choices: The Frequency and Timing of Qualified Immunity Motions

Qualified immunity can only protect a defendant from the burdens of discovery and trial if she raises the defense in a dispositive motion. Accordingly, this Section examines the frequency with which defendants raise qualified immunity and the stage of litigation at which they raise the defense.[84]

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83. *See* 28 U.S.C. § 1915(e)(2) (2012). A total of seventy-one cases were dismissed on these grounds. Note that district courts could exercise this power based on a belief that the defendants were entitled to qualified immunity. However, none of these § 1915(e) dismissals referenced or appeared to rely on qualified immunity as a basis for the decision.

84. Because qualified immunity is an affirmative defense, government defendants may also raise qualified immunity in their answers. *See* FED. R. CIV. P. 8(c)(1). I did not track the frequency with which government defendants raised qualified immunity in their answers because my focus is on the frequency with which qualified immunity leads to case dismissal, but I found

TABLE 2.
FREQUENCY WITH WHICH QUALIFIED IMMUNITY IS RAISED

District	Total cases in which QI could be raised	Total cases raising QI
S.D. TX	106	58 (54.7%)
M.D. FL	155	84 (54.2%)
N.D. OH	139	66 (47.5%)
N.D. CA	219	74 (33.8%)
E.D. PA	360	86 (23.9%)
Total	**979**	**368 (37.6%)**

Defendants raised qualified immunity one or more times in 368 (37.6%) of the 979 cases in which defendants could raise the defense. The frequency with which defendants raised qualified immunity varied substantially by district. Defendants in the Southern District of Texas and the Middle District of Florida were most likely to raise the qualified immunity defense; in these districts, defendants brought one or more motions raising qualified immunity in approximately 54% of the cases in which the defense could be raised. Defendants in the Eastern District of Pennsylvania were least likely to raise the qualified immunity defense; defendants brought one or more motions raising qualified immunity in approximately 24% of cases in which the defense could be raised. Defendants in the Northern District of California brought qualified immunity motions in 33.8% of possible cases, and in the Northern District of Ohio defendants raised qualified immunity in 47.5% of possible cases.

I also explored the stage(s) of litigation at which qualified immunity was raised. Of the 368 cases in which qualified immunity was raised at least once, defendants in ninety-five (25.8%) cases raised qualified immunity only in a motion to dismiss or motion for judgment on the pleadings, defendants in 229 (62.2%) cases raised qualified immunity only in a motion for summary judgment, and defendants in forty-one (11.1%) cases raised qualified immunity at both the motion to dismiss and summary judgment stages. Based on my review of motions and opinions available on Bloomberg Law, I can confirm only three cases in which defendants included qualified immunity in a motion at or after trial for judgment as a matter of law. My data almost certainly underrepresent the role qualified immunity plays at or after trial, however, as Bloomberg

no instances in which a defense raised in an answer led to dismissal without a separate motion raising the defense.

Law does not include oral motions or court decisions issued without a written opinion.[85]

TABLE 3.
TIMING OF QUALIFIED IMMUNITY MOTIONS

District	QI raised only at MTD/ pleadings	QI raised only at SJ	QI raised only at/after trial	QI raised at both MTD & SJ	QI raised at both SJ & at/ after trial	Total
S.D. TX	15 (25.9%)	37 (63.8%)	0	6 (10.3%)	0	**58**
M.D. FL	33 (39.3%)	32 (38.1%)	0	18 (21.4%)	1 (1.2%)	**84**
N.D. OH	14 (21.2%)	49 (74.2%)	0	3 (4.5%)	0	**66**
N.D. CA	11 (14.9%)	56 (75.7%)	0	6 (8.1%)	1 (1.4%)	**74**
E.D. PA	22 (25.6%)	55 (64.0%)	1 (1.2%)	8 (9.3%)	0	**86**
Total	**95 (25.8%)**	**229 (62.2%)**	**1 (0.3%)**	**41 (11.1%)**	**2 (0.5%)**	**368**

Across the five districts in my study, defendants raised qualified immunity at summary judgment approximately twice as often as they did at the motion to dismiss stage. In cases where defendants brought one or more qualified immunity motions, defendants in 73.9% of the cases raised qualified immunity at summary judgment, whereas defendants in 37.0% of the cases raised qualified immunity in a motion to dismiss. There is, however, regional variation in this

85. Even more difficult to decipher is the role qualified immunity might play in jury deliberations. Although qualified immunity is a question of law, juries may be called upon to resolve factual disputes relevant to qualified immunity and have been allowed to decide qualified immunity in some instances. *See, e.g.*, Mesa v. Prejean, 543 F.3d 264, 269 (5th Cir. 2008) ("The issue of qualified immunity is a question of law, but in certain circumstances where 'there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.'" (citation omitted)); Hale v. Kart, 396 F.3d 721, 728 (6th Cir. 2005) ("[A] court can submit to the jury the factual dispute with an appropriate instruction to find probable cause and qualified immunity if the factual inquiry is answered one way and to find probable cause and qualified immunity lacking if the inquiry is answered in another way."). This study does not attempt to measure the frequency with which qualified immunity is invoked in jury instructions, or the frequency with which juries' decisions are influenced by such instructions.

regard. Defendants in the Middle District of Florida were equally likely to raise qualified immunity at the pleadings stage and at summary judgment, whereas in the Northern District of Ohio and the Northern District of California defendants were more than three times more likely to raise qualified immunity at summary judgment than they were to raise the defense in a motion to dismiss.

Defendants in the Middle District of Florida were also more likely to raise qualified immunity at more than one stage of litigation—they raised qualified immunity at multiple stages of litigation in nineteen (22.6%) of the cases in which they raised the defense. Defendants in the other districts less frequently raised qualified immunity at multiple stages of litigation; they did so in six (10.3%) of the cases in which the defense was raised in the Southern District of Texas, in seven (9.5%) of the cases in which the defense was raised in the Northern District of California, in eight (9.3%) of the cases in which the defense was raised in the Eastern District of Pennsylvania, and in three (4.5%) of the cases in which the defense was raised in the Northern District of Ohio.

I additionally sought to calculate how frequently defendants chose to raise qualified immunity motions in all the cases in which such motions could be brought. This calculation is relatively straightforward regarding motions to dismiss. Defendants could have brought motions to dismiss on qualified immunity grounds in any of the 979 cases in which the defense could be raised and did so in 136 (13.9%) of these cases.

Calculating the number of possible summary judgment motions on qualified immunity grounds is more complicated. Although defendants could bring a summary judgment motion in any case in which they could offer some evidence in support, defendants generally do not move for summary judgment without first engaging in at least some formal discovery.[86] It is difficult to discern from case dockets to what extent parties have engaged in discovery, but the dockets do reflect whether a case management order has been issued, which generally sets the discovery schedule and is the first step of the discovery process. If entry of a case management order can serve as an indication that a case

86. I located five cases in my dataset—two from the Southern District of Texas and one each from the Northern District of California, Eastern District of Pennsylvania, and Middle District of Florida—in which defendants appear to have moved for summary judgment without first conducting discovery. *See* Egan v. Cty. of Del Norte, No. 1:12-cv-05300 (N.D. Cal. Oct. 11, 2012); Goodarzi v. Hartzog, No. 4:12-cv-02870 (S.D. Tex. Sept. 25, 2012); Rollerson v. City of Freeport, No. 4:12-cv-01790 (S.D. Tex. June 14, 2012); Kline v. City of Philadelphia, No. 2:11-cv-04334 (E.D. Pa. July 6, 2011); Hill v. Lee Cty. Sheriff's Office, No. 2:11-cv-00242 (M.D. Fla. Apr. 27, 2011). In two of these cases, *Rollerson* and *Hill*, the defendants brought a motion to dismiss and simultaneously moved for summary judgment in the alternative; the courts in both cases granted defendants' motions to dismiss without addressing the summary judgment motions.

has entered discovery, and if one accepts that defendants in cases that have conducted some discovery could move for summary judgment, then there are 577 cases in my dataset in which defendants could have moved for summary judgment. Defendants brought summary judgment motions on qualified immunity grounds in 272 (47.1%) of these cases.

I also calculated the total number of qualified immunity motions brought by defendants. Defendants sometimes raised qualified immunity in multiple motions to dismiss or summary judgment motions that were resolved by the court in separate opinions: if, for example, defendants moved to dismiss on qualified immunity grounds, the court granted the motion with leave to amend, and the plaintiff filed an amended complaint, the defendants might again move to dismiss on qualified immunity grounds.[87] Defendants filed a total of 440 qualified immunity motions in the 368 cases in which they raised the defense. Table 4 reflects the stage of litigation at which these 440 motions were brought and, again, reflects that defendants file significantly more qualified immunity motions at summary judgment than at the motion to dismiss stage. Of the 440 qualified immunity motions filed, 154 (35.0%) were filed in a motion to dismiss or motion for judgment on the pleadings, and 283 (64.3%) were filed at summary judgment.

87. There were a handful of instances in which different defendants contemporaneously filed separate motions to dismiss or summary judgment motions raising qualified immunity. If the motions were filed at approximately the same time and were resolved by a single district court opinion, I coded them as a single motion because I believe it more accurately reflects the time needed by the parties and the court to resolve each qualified immunity issue as it arose.

TABLE 4.
TOTAL QUALIFIED IMMUNITY MOTIONS FILED, BY STAGE OF LITIGATION

District	Total MTDs/pleadings raising QI	Total SJ motions raising QI	Total QI motions at/after trial	Total QI motions
S.D. TX	23 (33.3%)	46 (66.7%)	0	**69**
M.D. FL	59 (53.2%)	51 (45.9%)	1 (0.9%)	**111**
N.D. OH	17 (23.9%)	54 (76.1%)	0	**71**
N.D. CA	23 (25.3%)	67 (73.6%)	1 (1.1%)	**91**
E.D. PA	32 (32.7%)	65 (66.3%)	1 (1.0%)	**98**
Total	**154 (35.0%)**	**283 (64.3%)**	**3 (0.7%)**	**440**

TABLE 5.
NUMBER OF QUALIFIED IMMUNITY MOTIONS PER CASE

District	Number of motions in which QI was raised						Total cases in which QI could be raised
	Zero	One	Two	Three	Four	Five	
S.D. TX	48 (45.3%)	48 (45.3%)	9 (8.5%)	1 (0.9%)	0	0	**106**
M.D. FL	71 (45.8%)	63 (40.6%)	17 (11.0%)	4 (2.6%)	0	0	**155**
N.D. OH	73 (52.5%)	61 (43.9%)	5 (3.6%)	0	0	0	**139**
N.D. CA	145 (66.2%)	61 (27.9%)	11 (5.0%)	1 (0.5%)	0	1 (0.5%)	**219**
E.D. PA	273 (75.8%)	76 (21.1%)	11 (3.1%)	0	0	0	**360**
Total	**610 (62.3%)**	**309 (31.6%)**	**53 (5.4%)**	**6 (0.6%)**	**0**	**1 (0.1%)**	**979**

Table 5 reflects the distribution of these 440 motions among the 368 cases in which the defense was raised. Table 5 shows that when defendants raise qualified immunity they usually do so in only one motion, but that defendants in the Southern District of Texas and Middle District of Florida are more likely

than defendants in the other three districts to file multiple motions raising qualified immunity.

Finally, I explored how frequently defendants raise other types of defenses in motions to dismiss or for judgment on the pleadings and in summary judgment motions. Qualified immunity is usually one of several arguments defendants make in their motions to dismiss and for summary judgment. Indeed, defendants sometimes move to dismiss or for summary judgment without raising qualified immunity at all.

Of the 979 cases in my docket dataset in which defendants could raise qualified immunity, defendants filed a total of 462 motions to dismiss, and 154 (33.3%) included a qualified immunity argument.[88] Defendants in the Middle District of Florida were the most likely to raise qualified immunity in motions to dismiss or for judgment on the pleadings – defendants included a qualified immunity argument in 45.4% of their motions, compared with 39.0% of the motions filed by defendants in the Southern District of Texas, 32.1% of the motions filed by defendants in the Northern District of Ohio, 26.2% of the motions filed by defendants in the Eastern District of Pennsylvania, and 23.5% of the motions filed by defendants in the Northern District of California. Motions to dismiss or for judgment on the pleadings that did not raise qualified immunity argued instead that the complaint did not satisfy plausibility pleading requirements, concerned a claim that was barred by a criminal conviction, or otherwise did not state a legally cognizable claim.[89]

88. *See infra* Figure 1. I have included in my count of motions to dismiss and for summary judgment instances in which the municipality moved to dismiss but the individual defendant(s) did not. One could take issue with this choice, as municipalities are not protected by qualified immunity. Yet I included these motions in my calculation because they reflect opportunities in which the law enforcement defendants moved to dismiss but failed to raise qualified immunity in the motion.

89. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (setting out the plausibility pleading standard); Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (holding that a plaintiff seeking damages for an unconstitutional conviction or sentence must have that conviction or sentence declared invalid before a Section 1983 claim can proceed).

FIGURE 1.
MOTIONS TO DISMISS/FOR JUDGMENT ON THE PLEADINGS

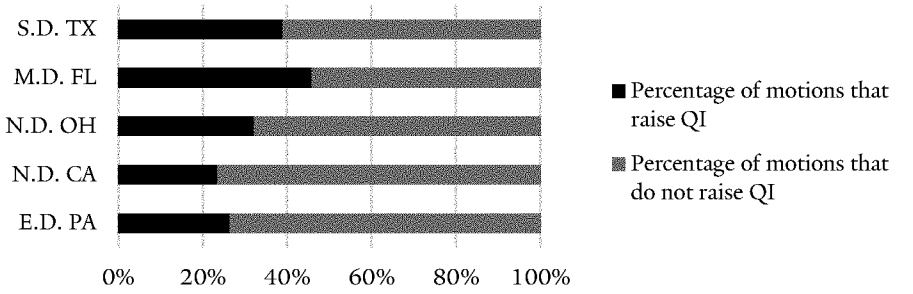
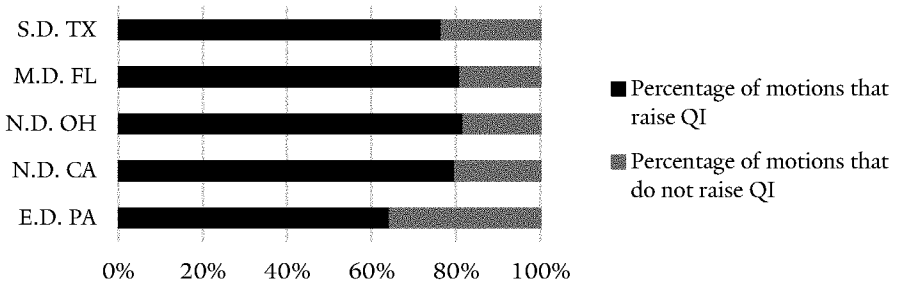


FIGURE 2.
SUMMARY JUDGMENT MOTIONS



Defendants in all five districts were far more likely to include a qualified immunity argument in their summary judgment motions. Defendants filed 374 motions for summary judgment, and 283 (75.7%) of those motions included an argument based on qualified immunity. There was some variation among the districts in this area as well, although the regional variation was less pronounced here than in other aspects of qualified immunity litigation practice.[90]

90. Qualified immunity was raised in 64.4% of summary judgment motions filed in the Eastern District of Pennsylvania, 76.7% of summary judgment motions filed in the Southern District of Texas, 79.8% of summary judgment motions filed in the Northern District of California, 81.0% of summary judgment motions filed in the Middle District of Florida, and 81.8% of summary judgment motions filed in the Northern District of Ohio.

C. District Courts' Decisions: The Success Rate of Qualified Immunity Motions

This Section examines how frequently district courts grant motions to dismiss and for summary judgment on qualified immunity grounds. As I have shown, qualified immunity is almost always raised in conjunction with other arguments in motions to dismiss or for summary judgment. My focus here is on the way the district court evaluates the qualified immunity argument.

TABLE 6.
SUCCESS OF MOTIONS RAISING QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	15 (21.7%)	33 (29.7%)	27 (38.0%)	30 (33.0%)	34 (34.7%)	**139 (31.6%)**
QI granted in part	7 (10.1%)	7 (6.3%)	6 (8.5%)	5 (5.5%)	1 (1.0%)	**26 (5.9%)**
QI granted in full	16 (23.2%)	18 (16.2%)	3 (4.2%)	11 (12.1%)	5 (5.1%)	**53 (12.0%)**
QI in the alternative/fails 1st step	5 (7.2%)	12 (10.8%)	11 (15.5%)	9 (9.9%)	13 (13.3%)	**50 (11.4%)**
Grant (not on QI)	7 (10.1%)	13 (11.7%)	12 (16.9%)	13 (14.3%)	17 (17.3%)	**62 (14.1%)**
Grant (reasoning unclear)	2 (2.9%)	2 (1.8%)	0	0	5 (5.1%)	**9 (2.0%)**
GiP (not on QI or QI in alt.)	4 (5.8%)	6 (5.4%)	2 (2.8%)	8 (8.8%)	6 (6.1%)	**26 (5.9%)**
Not decided	13 (18.8%)	20 (18.0%)	10 (14.1%)	15 (16.5%)	17 (17.3%)	**75 (17.0%)**
Total motions	**69**	**111**	**71**	**91**	**98**	**440**

In the five districts in my docket dataset, defendants raised qualified immunity in a total of 440 motions. Table 6 reflects the way in which district courts resolved those motions.[91] Across the five districts in my study, qualified

91. I have coded decisions in a way that focuses on the role of qualified immunity in the decision. If a defendant's motion raises multiple arguments and qualified immunity is granted but all other bases for the motion are denied, I coded that decision as granted on qualified immunity grounds. Conversely, if a defendant's motion raises multiple arguments and qualified immunity is denied and all other bases for the motion are granted, I coded that decision as denied on qualified immunity. Included in the "QI granted in part" row are decisions in which one or more defendants who have moved to dismiss on qualified immunity grounds

immunity motions were denied 31.6% of the time.[92] Qualified immunity motions in these five districts were granted in part—on some claims or defendants but not others—5.9% of the time and granted in full on qualified immunity grounds 12.0% of the time. In another 11.4% of the decisions, courts concluded that the plaintiff had not met her burden of establishing a constitutional violation and either declined to reach the second step of the qualified immunity analysis (whether a reasonable officer would have believed that the law was clearly established) or granted qualified immunity in the alternative.[93] Courts in 14.1% of the decisions granted defendants' motions on other grounds without addressing qualified immunity, and in another 2.0% of the decisions the courts offered little or no rationale. Courts in 5.9% of the decisions granted the motion in part without mentioning qualified immunity, or on qualified immunity in the alternative. And district courts in my study did not decide 17.0% of the motions raising qualified immunity, usually because the cases settled or were voluntarily dismissed while the motions were pending.

There was substantial variation in courts' decisions across the districts in my study. The Southern District of Texas had the lowest rate of qualified immunity denials (21.7%). In the remaining four districts, judges denied 30-38% of defendants' qualified immunity motions. The Southern District of Texas also had the highest rate of qualified immunity grants: courts in the Southern District of Texas granted 33.3% of defendants' qualified immunity motions in part or full on qualified immunity grounds. In contrast, courts in the Eastern District of Pennsylvania granted only 6.1% of the qualified immunity motions in whole or part on qualified immunity grounds.[94]

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were awarded qualified immunity but qualified immunity was denied for some defendants or claims.

92. This finding is consistent with findings in other qualified immunity studies described *supra* note 10, even though there are significant differences in our datasets and the manner in which we coded decisions.

93. If a court did not specify which step of the qualified immunity analysis was dispositive, or concluded that the law was not clearly established without resolving whether a constitutional violation occurred, I coded these decisions as grants or partial grants on qualified immunity grounds. These decisions are reflected in rows two and three of Tables 6-8.

94. The differences in the frequency with which motions are granted or granted in part on qualified immunity grounds (rows two and three in Table 6) across the five districts are statistically significant ($\chi^2 = 23.32$, $p<.001$). But the differences in the frequency with which qualified immunity is denied (row one in Table 6) across the five districts are not statistically significant ($\chi^2 = 5.15$, $p=.27$). The differences in the frequency with which motions are granted in the alternative or granted in part on grounds other than qualified immunity (rows four, five, six, and seven in Table 6) across the five districts are also not statistically significant ($\chi^2 = 5.58$, $p=.23$).

TABLE 7.
RULINGS ON MOTIONS TO DISMISS/ON THE PLEADINGS THAT RAISED QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	6 (26.1%)	17 (28.8%)	4 (23.5%)	7 (30.4%)	12 (37.5%)	**46 (29.9%)**
QI granted in part	2 (8.7%)	2 (3.4%)	1 (5.9%)	2 (8.7%)	0	**7 (4.5%)**
QI granted	4 (17.4%)	5 (8.5%)	0	2 (8.7%)	3 (9.4%)	**14 (9.1%)**
QI in the alternative/fails 1st step	1 (4.3%)	3 (5.1%)	4 (23.5%)	0	2 (6.3%)	**10 (6.5%)**
Grant (not on QI)	3 (13.0%)	11 (18.6%)	2 (11.8%)	6 (26.1%)	4 (12.5%)	**26 (16.9%)**
Grant (reasoning unclear)	0	2 (3.4%)	0	0	4 (12.5%)	**6 (3.9%)**
GiP (not on QI or QI in alt.)	2 (8.7%)	6 (10.2%)	2 (11.8%)	3 (13.0%)	3 (9.4%)	**16 (10.4%)**
Not decided	5 (21.7%)	13 (22.0%)	4 (23.5%)	3 (13.0%)	4 (12.5%)	**29 (18.8%)**
Total motions	**23**	**59**	**17**	**23**	**32**	**154**

TABLE 8.
RULINGS ON SUMMARY JUDGMENT MOTIONS THAT RAISED QUALIFIED IMMUNITY

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
QI denied	9 (19.6%)	15 (29.4%)	23 (42.6%)	23 (34.3%)	21 (32.3%)	**91 (32.2%)**
QI granted in part	5 (10.9%)	5 (9.8%)	5 (9.3%)	3 (4.5%)	1 (1.5%)	**19 (6.7%)**
QI granted	12 (26.1%)	13 (25.5%)	3 (5.6%)	9 (13.4%)	2 (3.1%)	**39 (13.8%)**
QI in the alternative/fails 1st step	4 (8.7%)	9 (17.6%)	7 (13.0%)	8 (11.9%)	11 (16.9%)	**39 (13.8%)**
Grant (not on QI)	4 (8.7%)	2 (3.9%)	10 (18.5%)	7 (10.4%)	13 (20.0%)	**36 (12.7%)**
Grant (reasoning unclear)	2 (4.3%)	0	0	0	1 (1.5%)	**3 (1.1%)**
GiP (not on QI or QI in alt.)	2 (4.3%)	0	0	5 (7.5%)	3 (4.6%)	**10 (3.5%)**
Not decided	8 (17.4%)	7 (13.7%)	6 (11.1%)	12 (17.9%)	13 (20.0%)	**46 (16.3%)**
Total motions	**46**	**51**	**54**	**67**	**65**	**283**

I additionally evaluated differences in courts' decisions at the motion to dismiss and summary judgment stages.[95] Of the 154 motions to dismiss and motions for judgment on the pleadings raising qualified immunity, courts granted seventy-nine (51.3%) of the motions in whole or part. Twenty-one (26.6%) of those seventy-nine full or partial grants were decided on qualified immunity grounds. Of the 283 summary judgment motions raising qualified immunity, courts granted 146 (51.6%) in whole or part. Fifty-eight (39.7%) of those 146 full or partial grants were decided on qualified immunity grounds. In other words, although courts were equally likely to grant summary judgment motions and motions to dismiss, courts were more likely to grant summary judgment motions on qualified immunity grounds than they were to grant motions to dismiss on qualified immunity grounds. But courts more often than not granted both types of motions on grounds other than qualified immunity.

95. *See supra* Tables 7 & 8. Because the three qualified immunity motions raised at or after trial are not included in these tables, there are a total of 437 motions included in these two tables – three fewer than the 440 motions included in Table 6.

D. Circuit Courts' Decisions: The Frequency and Success of Qualified Immunity Appeals

A complete examination of the role qualified immunity plays in constitutional litigation must examine the frequency and outcome of qualified immunity appeals. Defendants can appeal denials of qualified immunity immediately, and any qualified immunity decision can be appealed after a final judgment in the case.[96]

TABLE 9.
INTERLOCUTORY APPEALS OF QUALIFIED IMMUNITY DENIALS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Affirmed	3	3	7	2	0	**15 (36.6%)**
Reversed	0	3	1	0	1	**5 (12.2%)**
Reversed in part	0	0	2	1	0	**3 (7.3%)**
Dismissed for lack of jurisdiction	0	0	1	0	0	**1 (2.4%)**
Withdrawn	2	3	6	5	0	**16 (39.0%)**
Pending	0	0	0	1	0	**1 (2.4%)**
Total interlocutory appeals	**5**	**9**	**17**	**9**	**1**	**41**

Defendants immediately appealed 41 of the 189 qualified immunity decisions in my docket dataset that were denied or granted in part and thus could have been appealed at this stage of the litigation—an interlocutory appeal rate of 21.7%. Across the five districts in my dataset, more than one-third of the lower courts' decisions were affirmed on interlocutory appeal, 12.2% were reversed in whole, 7.3% were reversed in part, and 39.0% were withdrawn by the parties without a decision by the court of appeals.

96. *See supra* Section I.B.3.

TABLE 10.
FINAL APPEALS OF QUALIFIED IMMUNITY GRANTS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Affirmed	7	5	3	1	1	**17 (65.4%)**
Reversed	0	0	1	1	0	**2 (7.7%)**
Affirmed in part	0	0	0	0	0	**0**
Withdrawn/ dismissed without decision	3	4	0	0	0	**7 (26.9%)**
Pending	0	0	0	0	0	**0**
Total appeals by plaintiff(s)	**10**	**9**	**4**	**2**	**1**	**26**

I also tracked the frequency with which plaintiffs appealed qualified immunity grants after a final judgment in the case.[97] Plaintiffs appealed twenty-six (32.9%) of the seventy-nine decisions granting defendants' motions on qualified immunity grounds in whole or part.[98] Lower court decisions granting qualified immunity were affirmed 65.4% of the time and reversed 7.7% of the time. Almost 27% of the appeals were withdrawn without a decision.

E. The Impact of Qualified Immunity on Case Dispositions

A final question concerns the frequency with which a grant of qualified immunity results in the dismissal of Section 1983 cases. There are multiple ways to frame this inquiry. First, there is the question of which cases should be counted in the numerator—cases dismissed on qualified immunity grounds. I have included qualified immunity grants in this category unless the court ended its qualified immunity analysis after concluding that the plaintiff could not establish a constitutional violation, or granted the motion on qualified immunity in the alternative. Although the question of whether a constitutional violation occurred is the first step of the qualified immunity analysis, the court

97. There was one case in the docket dataset in which a defendant appealed a qualified immunity decision at the end of the case. The jury verdict in the case was affirmed with no mention of qualified immunity. *See* Ayers v. City of Cleveland, 773 F.3d 161 (6th Cir. 2014).

98. I have not tracked appeals of motions granted on qualified immunity in the alternative, granted in whole or in part on other grounds, or granted based on unclear reasoning.

would also need to resolve this question in the absence of qualified immunity. And although a court's decision to grant qualified immunity in the alternative may influence its dispositive holding in some manner, the qualified immunity decision was not necessary to resolve the case.[99]

In addition, I have counted a case as dismissed on qualified immunity grounds only if the entire case has been dismissed as a result of the motion. One might assume that a grant of qualified immunity will always end a case. Yet there are multiple scenarios in which a case can continue after a grant of qualified immunity. At the pleadings stage, a court may grant a motion to dismiss on qualified immunity but also grant the plaintiff an opportunity to amend her complaint.[100] Not all defendants in a case will necessarily move to dismiss on qualified immunity grounds,[101] or a defendant may seek qualified immunity regarding some but not all claims against him.[102] State law claims may also remain for which qualified immunity is not available, and these claims may proceed in federal court or be remanded to and pursued in state court.[103]

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99. If I included these cases in my count, the total number of cases dismissed on qualified immunity grounds would increase from thirty-eight to seventy-one: a total of fifteen cases in the Southern District of Texas, twenty-three cases in the Middle District of Florida, twelve cases in the Northern District of Ohio, eight cases in the Northern District of California, and thirteen cases in the Eastern District of Pennsylvania. This amounts to 7.3% of all cases in which qualified immunity could be raised, and 6.0% of all the cases in my dataset.

100. *See, e.g.*, Daleo v. Polk Cty. Sheriff, No. 8:11-cv-2521 (M.D. Fla. Nov. 7, 2011).

101. *See, e.g.*, Tarantino v. Canfield, No. 5:12-cv-0434 (M.D. Fla. Aug. 3, 2012); Roberts v. Knight, No. 4:12-cv-1174 (S.D. Tex. Apr. 18, 2012); Brivik v. Law, No. 8:11-cv-2101 (M.D. Fla. Sept. 15, 2011); Terrell v. City of La Marque, No. 3:11-cv-0229 (S.D. Tex. May 16, 2011).

102. *See, e.g.*, Jones v. City of Lake City, No. 3:11-cv-1210 (M.D. Fla. Dec. 6, 2011); Snowden v. City of Philadelphia, No. 2:11-cv-5041 (E.D. Pa. Aug. 5, 2011); Castillo v. City of Corpus Christi, No. 2:11-cv-0093 (S.D. Tex. Apr. 5, 2011); Kelley v. Papanos, No. 4:11-cv-0626 (S.D. Tex. Feb. 22, 2011).

103. *See, e.g.*, McKay v. City of Hayward, No. 3:12-cv-1613 (N.D. Cal. Mar. 30, 2012); Stephenson v. McClelland, No. 4:11-cv-2243 (S.D. Tex. June 15, 2011). There are eight cases in my dataset—six in the Middle District of Florida, one in the Northern District of Ohio, and one in the Eastern District of Pennsylvania—in which the federal claims were dismissed on qualified immunity grounds and the state law claims were remanded to state court. I have sought information about whether plaintiffs continued to litigate these claims in state court by contacting the plaintiffs' attorneys in these cases. Attorneys in two cases confirmed that they pursued the state claims in state court, and both cases resulted in settlements in state court. *See* E-mail from Nicholas Noel, attorney for plaintiffs in *O'Neill v. Kerrigan*, No. 5:11-cv-3437 (E.D. Pa. June 5, 2011), to author (Mar. 2, 2017, 12:18 PM) (on file with author) (confirming that the case was refiled in state court and settled after the federal claims were dismissed on qualified immunity grounds); E-mail from Jerry Theophilopoulos, attorney for plaintiffs in *Merricks v. Adkisson*, No. 8:12-cv-1805 (M.D. Fla. Aug. 10, 2012), to author (Mar. 13, 2017, 6:50 AM) (on file with author) (confirming that plaintiff refiled the case in state court after the federal claims were dismissed on qualified immunity grounds, and that the case settled

In addition, municipalities cannot assert qualified immunity; accordingly, if there is a municipality named in the case at the time qualified immunity is granted, the case will continue.[104] Under each of these circumstances, government officials still face the possibility that they will be required to participate in discovery and trial as defendants, representatives of the defendants' agency, and/or witnesses to the events in question.[105]

TABLE 11.
IMPACT OF QUALIFIED IMMUNITY, BY STAGE OF LITIGATION

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Motions raising QI on the pleadings	23	59	17	23	32	**154**
Total QI grants on the pleadings	4	5	0	2	3	**14**
Case dismissals on QI at the pleadings	3	3	0	0	1	**7**
Motions raising QI at summary judgment	46	51	54	67	65	**283**
Total QI grants at SJ	12	13	3	9	2	**39**
Case dismissals on QI at SJ	9	10	3	3	2	**27**
Total QI appeals by Ds	5	9	17	9	1	**41**
Total reversals	0	3	1	0	1	**5**
Case dismissals from appeal	0	2	1	0	1	**4**

at mediation for $30,000). Attorneys in two cases confirmed that the cases were not refiled in state court. *See* E-mail from Cynthia Conlin, attorney for plaintiffs in *Olin v. Orange Cty. Sheriff*, No. 6:12-cv-1455 (M.D. Fla. Sept. 25, 2012), to author (Mar. 2, 2017, 10:31 AM) (on file with author) (reporting that plaintiff did not pursue state law claims in state court after federal claims were dismissed on qualified immunity grounds); E-mail from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Apr. 4, 2011), to author (Mar. 2, 2017, 10:15 AM) (on file with author) (reporting that the state claims were not refiled in state court after summary judgment was granted on the federal claims). I sought but did not receive information about the other four cases.

104. *See, e.g.*, *McKay*, No. 3:12-cv-1613; Porter v. City of Santa Rosa, No. 3:11-cv-4886 (N.D. Cal. Oct. 3, 2011); *Terrell*, No. 3:11-cv-0229.

105. *See supra* note 42 and accompanying text (describing the Court's concerns about burdens on government officials who are not named defendants).

As Table 11 shows, there are fifty-three motions in my dataset that district courts granted in full on qualified immunity grounds—fourteen at the pleadings stage and thirty-nine at summary judgment. Of those fifty-three motions, thirty-four (64.2%) were dispositive, meaning that the cases were dismissed as a result of the qualified immunity decision. Half of qualified immunity grants at the pleadings stage led to case dismissals, and 69.2% of qualified immunity grants at summary judgment led to case dismissals. Defendants brought forty-one interlocutory appeals of qualified immunity denials, and courts of appeals reversed five (12.2%) of those decisions. All five reversals were of summary judgment decisions, and four of the five resulted in case dismissals. In total, qualified immunity led to dismissal of thirty-eight cases in my dataset.

The next question, when thinking about the impact of qualified immunity on case disposition, is how to frame the denominator—the universe of cases against which to measure the cases dismissed on qualified immunity grounds. It is my view that the broadest definition of the denominator—all 1,183 Section 1983 cases filed against law enforcement—offers the most accurate picture of the role qualified immunity plays in Section 1983 litigation. Yet, as I will show, there are at least three ways to frame the denominator, and each answers a different question about the extent to which qualified immunity achieves its intended goals.

One way to think about the impact of qualified immunity is to consider the frequency with which a defendant's motion to dismiss or for judgment on the pleadings, for summary judgment, or for judgment as a matter of law on qualified immunity grounds actually leads to the dismissal of a case—whether because the motion is granted or because the motion is denied by the district court but reversed on appeal. Presumably, a defendant will only bring a qualified immunity motion when two conditions are met: he has a non-frivolous basis for the motion, and he believes that the costs of bringing the motion are justified by the likelihood of success or some other benefit associated with the motion. Accordingly, this framework assesses the frequency with which qualified immunity results in the dismissal of cases in which both these things are true.

Defendants brought 440 qualified immunity motions in a total of 368 cases in the five districts in my study: defendants raised qualified immunity in 154 motions to dismiss and raised qualified immunity in 283 summary judgment motions. Courts granted 9.1% of the motions to dismiss on qualified immunity grounds, and 4.5% of the motions resulted in case dismissals. Courts granted 13.8% of the summary judgment motions on qualified immunity grounds, and 9.5% of the motions resulted in case dismissals. Defendants brought forty-one interlocutory appeals of qualified immunity denials, courts of appeals reversed

five (12.2%) of those decisions, and four of the five were dismissed as a result. In total, thirty-eight (8.6%) of the 440 qualified immunity motions raised by defendants in my dataset resulted in case dismissals, and 10.3% of the 368 cases in which qualified immunity was raised were dismissed on qualified immunity grounds.

Another way to assess the impact of qualified immunity on case outcomes is to examine what percentage of the 979 cases in my dataset in which qualified immunity could be raised were in fact dismissed on qualified immunity grounds. One objection to this framing might be that it includes cases that defendants declined to challenge on qualified immunity grounds. But qualified immunity motions would not necessarily have failed in these cases; rather, defendants in these cases concluded that the costs of raising the defense were not justified by the likelihood of success or other benefits of bringing the motions. Moreover, this broader framework illustrates the frequency with which qualified immunity doctrine serves its intended and expected role of shielding government officials from burdens associated with discovery and trial. Evaluated in this manner, qualified immunity is less frequently successful. Qualified immunity was the basis for dismissal in 3.9% of the 979 cases in which the defense could be raised: just seven (0.7%) of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and thirty-one (3.2%) of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.

Indeed, to evaluate fully the role that qualified immunity plays in the resolution of constitutional claims against law enforcement, the most appropriate denominator is the complete universe of 1,183 cases in my dataset. This approach includes cases that could not be resolved on qualified immunity grounds—because the cases were either brought only against municipalities or sought only equitable relief. But to the extent that the Court views qualified immunity doctrine as a shield for all government officials—not only defendants—from burdens associated with discovery and trial, a thorough assessment of qualified immunity's role should take account of all the cases in which government officials must participate. Qualified immunity was the basis for dismissal in 3.2% of the 1,183 cases in my dataset: 0.6% of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 2.6% of cases were dismissed on qualified immunity grounds at summary judgment—either by the district court or on appeal.[106]

106. These findings are consistent with another study that used dockets to track case outcomes in *Bivens* actions. *See* Reinert, *supra* note 11, at 843 (finding qualified immunity to be "the basis for a dismissal in only 5 out of the 244 complaints studied").

My data show that qualified immunity is rarely the formal reason that Section 1983 cases are dismissed. How, then, are Section 1983 suits against law enforcement resolved? Table 12 reports case outcomes for the 1,183 cases in the five districts in my study.

TABLE 12.
CASE DISPOSITIONS

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Settlement/R.68 Judgment	41	59	69	103	218	**490**
Voluntary/stipulated dismissal	30	37	34	45	36	**182**
Sua sponte dismissal before defendant responds	11	50	27	11	27	**126**
Dismissed as sanction	1	1	0	0	3	**5**
Dismissed for failure to prosecute	1	7	7	24	3	**42**
Remanded to state court	0	8	0	3	5	**16**
Motion to dismiss granted (not based on QI)	11	21	12	16	26	**86**
Summary judgment granted (not based on QI)	17	13	16	21	33	**100**
Directed verdict for D (not based on QI)	0	0	0	1	2	**3**
MTD granted based on QI	**3**	**3**	**0**	**0**	**1**	**7 (0.6%)**
SJ granted based on QI	**9**	**10**	**3**	**3**	**2**	**27 (2.3%)**
QI granted at or after trial	**0**	**0**	**0**	**0**	**0**	**0**
QI granted on appeal	**0**	**2**	**1**	**0**	**1**	**4 (0.3%)**
Case open, stayed, or on appeal	0	0	2	5	5	**12**
Trial – plaintiff verdict	0	0	1	2	4	**7**
Trial – defense verdict	7	11	0	12	37	**67**
Split verdict	0	1	0	0	2	**3**
Other	0	2	0	2	2	**6**
Total cases	**131**	**225**	**172**	**248**	**407**	**1,183**

If one adopts the standard definition of plaintiff "success" to include jury verdicts, settlements, and voluntary or stipulated dismissals, the plaintiffs in my dataset succeeded in 682 (57.7%) cases.[107] This success rate is similar to the results of Theodore Eisenberg and Stewart Schwab's studies of non-prisoner Section 1983 cases.[108] The remaining 42.3% of cases resolved in various ways: 256 (21.6%) were dismissed on motions to dismiss or for judgment on the pleadings, at summary judgment, or at or after trial on grounds other than qualified immunity; 173 (14.6%) were dismissed sua sponte before defendants answered, dismissed as a sanction, or dismissed for failure to prosecute; and thirty-seven (3.1%) were dismissed for other reasons or remain open. Thirty-eight (3.2%) were dismissed on qualified immunity grounds.

My data do not capture how frequently qualified immunity influences plaintiffs' decisions to settle, or how frequently cases are decided on qualified immunity grounds even though other defenses are available. Instead, my data reflect the frequency with which a grant of qualified immunity formally ends a case. There is, once again, marked regional variation in the frequency with which qualified immunity leads to the dismissal of Section 1983 actions.[109] But despite this regional variation, grants of qualified immunity motions infrequently end Section 1983 suits before discovery, and are infrequently the reason suits are dismissed before trial.

IV. IMPLICATIONS

My findings undermine prevailing assumptions about the role qualified immunity plays in the litigation of Section 1983 claims. Accordingly, in this Part I consider the implications of my findings for ongoing discussions about the proper scope of qualified immunity in relation to its underlying purposes. First, I revisit empirical claims implicit in the Supreme Court's qualified im-

107. *See id.* at 812-13 n.13 (describing the common definition of plaintiff "success" in similar studies). Even those who adopt this standard definition recognize that it is likely over-inclusive—at least some of these cases are settled or withdrawn on terms unfavorable to the plaintiff. *See id.* Note that I am including the three split verdicts in my count of plaintiff successes.

108. Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 730 (1988) (finding that "[n]onprisoner constitutional tort cases succeed[ed] about half the time" in their study of filings in three districts); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 682 (1987) (finding that "[t]he success rate for counseled cases (which eliminates nearly all prisoner cases) is about one-half" in their study of the Central District of California).

109. *See supra* Table 12; *see also infra* text accompanying note 115 (describing this variation).

munity decisions in light of my findings. Next, I consider why qualified immunity disposes of so few cases before trial. Armed with this more realistic appraisal of qualified immunity's role, I argue that the Court has struck the wrong balance between fairness and accountability for law enforcement officers. Finally, I suggest that qualified immunity doctrine should be adjusted to comport with available evidence about the role the doctrine plays in constitutional litigation.

A. *Toward a More Accurate Description of Qualified Immunity's Role in Constitutional Litigation*

The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate: it should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), it should be strong (protecting all but the plainly incompetent or those who knowingly violate the law), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial in insubstantial cases. Commentators similarly believe that qualified immunity is often raised by defendants, usually granted by courts, and causes many cases to be dismissed.[110]

My study shows that, at least in filed cases, qualified immunity rarely functions as expected. Defendants could not or did not need to raise qualified immunity in 17.3% of the 1,183 cases in my docket dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer. Defendants raised qualified immunity in motions to dismiss and motions for judgment on the pleadings in only 13.9% of the cases in which the defense could be raised.[111] Courts granted those motions on qualified immunity grounds 9.1% of the time, but those grants were not always dispositive because additional claims or defendants remained, or because plaintiffs were given the opportunity to amend. As a result, just seven of the 1,183 cases in my docket dataset were dismissed at the motion to dismiss stage on qualified immunity grounds.

Qualified immunity more often prevented cases from proceeding past summary judgment. Defendants were more likely to include qualified immuni-

110. *See supra* note 6 and accompanying text.

111. There was a total of 979 cases in which qualified immunity could be raised, and defendants raised motions to dismiss or for judgment on the pleadings on qualified immunity grounds in 136 of those cases. *See supra* Tables 2 & 3.

ty in motions for summary judgment than in motions to dismiss, and courts were more likely to grant summary judgment motions than motions to dismiss on qualified immunity grounds.[112] Moreover, courts of appeals reversed five denials of summary judgment motions on interlocutory appeal and granted qualified immunity in these cases. Yet qualified immunity motions at the summary judgment stage rarely shield government officials from discovery because most summary judgment motions require at least some depositions or document exchange.[113] And grants of qualified immunity at summary judgment relatively rarely achieved their goal of protecting government officials from trial—such decisions by the district courts or courts of appeals disposed of plaintiffs' cases just thirty-one times across the five districts in my study, amounting to just 2.6% of the 1,183 cases in my dataset.

Qualified immunity is likely raised more often at or after trial than my data suggest. But even if many more qualified immunity motions are made during or after trial, and even if qualified immunity regularly convinces judges and juries to enter defense verdicts, qualified immunity would still fail to serve its expected role. Qualified immunity doctrine is intended to shield government officials from burdens associated with litigation and trial. A grant of qualified immunity entered during or after trial has come too late to shield government officials from these assumed burdens.

My data demonstrate considerable regional differences in the litigation and adjudication of qualified immunity across the country. Scholars have observed that the federal circuits interpret qualified immunity standards differently.[114]

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112. *See supra* Table 4 (showing that 64.3% of qualified immunity motions were made at summary judgment); *supra* Table 8 (showing that 13.8% of qualified immunity motions made at summary judgment were granted).

113. *See supra* note 79 and accompanying text.

114. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) ("One has to look hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." (footnotes omitted)); Jeffries, *supra* note 6, at 852 ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court."); Jeffries, *supra* note 61, at 250 n.151 ("There is considerable variation among the circuits. The Ninth Circuit often construes qualified immunity to favor plaintiffs and is often reversed for that reason. The Eleventh Circuit leans so far in the other direction that it has been called the land of '*un*qualified immunity.'" (citations omitted)); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 40-41 (2015) (finding circuit variation in the frequency with which the Fifth, Sixth, and Ninth Circuits courts exercise their discretion under *Pearson* to decide whether a constitutional violation occurred); Wilson, *supra* note 61, at 447-48 (describing variation in the ways circuit courts analyze whether the law is clearly established).

My findings suggest that regional differences in qualified immunity doctrine affect the decisions of courts and litigants. Defendants in the Southern District of Texas and the Middle District of Florida were more likely to raise qualified immunity than defendants in the Eastern District of Pennsylvania and the Northern District of California; courts in the Southern District of Texas and the Middle District of Florida were more likely to grant defendants' qualified immunity motions than were judges in the Eastern District of Pennsylvania and the Northern District of California; and grants of qualified immunity ended more cases in the Southern District of Texas and the Middle District of Florida than in the Eastern District of Pennsylvania and the Northern District of California. But even in the Southern District of Texas – the district in my dataset most likely to dismiss cases on qualified immunity grounds – just 2.3% of all suits were dismissed on qualified immunity grounds at the motion to dismiss stage, and 6.9% of all suits were dismissed at summary judgment on qualified immunity grounds.[115] Unless the vast majority of law enforcement officer defendants in the Southern District of Texas are "plainly incompetent" or have "knowingly violate[d] the law,"[116] qualified immunity is not playing its expected role even in the district in my dataset most sympathetic to the defense.

Although qualified immunity is rarely the reason that Section 1983 cases end, there are other ways in which qualified immunity doctrine might influence the litigation of constitutional claims against law enforcement. For example, qualified immunity may discourage people from ever filing suit. Available evidence suggests that just 1% of people who believe they have been harmed by the police file lawsuits against law enforcement.[117] We do not know how frequently qualified immunity doctrine plays a role in the decision not to sue. But available evidence suggests that qualified immunity often factors into plaintiffs' attorneys' decisions about whether to accept potential clients. When Alexander Reinert interviewed plaintiffs' attorneys about qualified immunity in *Bivens* cases, attorneys reported that "the qualified immunity defense play[s] a substantial role at the screening stage."[118] Attorneys described being discouraged from accepting civil rights cases both because qualified immunity motions can be difficult to defeat and because the costs and delays associated with litigating qualified immunity can make the cases too burdensome to pursue.[119] But at-

115. *See supra* Table 12.

116. Malley v. Briggs, 475 U.S. 335, 341 (1986).

117. *See* Schwartz, *What Police Learn*, *supra* note 71, at 863.

118. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

119. *Id.* at 492-94.

torneys also described qualified immunity as one of many factors they considered when deciding whether to accept a case, and we do not know how attorneys weigh these different considerations.[120]

Even when cases are filed, qualified immunity may influence litigation decisions in ways that are not easily observable through docket review. For example, it may be that a pending qualified immunity motion will cause a plaintiff to settle her claims. Consistent with this theory, seventy-five (17.0%) of the qualified immunity motions in my dataset were never decided, presumably because the parties settled while the motions were pending.[121] Of the sixty-seven qualified immunity interlocutory and final appeals in my dataset, twenty-three (34.3%) were withdrawn or dismissed without decision, which suggests that many of those cases settled while on appeal.[122] When the Supreme Court has described the ways in which it expects qualified immunity to shield government officials from discovery and trial, it has never suggested that the doctrine might serve this function by discouraging people from filing lawsuits or pursuing their claims. But these are certainly ways in which qualified immunity could achieve this goal.

A complete understanding of the frequency with which qualified immunity protects government officials from discovery and trial would measure these other potential litigation effects. For the time being, available evidence suggests that qualified immunity may make it more difficult for plaintiffs to secure representation and may encourage plaintiffs to settle, but it is infrequently the formal reason that cases end.

B. Why Qualified Immunity Disposes of So Few Cases

The Supreme Court designed qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law."[123] Why, then, does it lead to the dismissal of so few cases? One possibility is that qualified immunity doctrine discourages people from filing cases that are unlikely to meet qualified immunity's exacting standard.[124] But even if qualified immunity

120. *Id.*

121. *See supra* Table 6.

122. *See supra* Tables 9 & 10.

123. Malley v. Briggs, 475 U.S. 335, 341 (1986).

124. *See supra* notes 118-122 and accompanying text. For further discussion of selection effects, see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1965 (2009); and George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

has this selection effect, plaintiffs would continue to file cases in which qualified immunity motions *might* be successful. Consistent with this theory, defendants raised qualified immunity in more than one-third of the Section 1983 cases in which the defense could be asserted, and courts granted 51.4% of motions raising qualified immunity in full or part.[125] Yet most of these motions to dismiss and summary judgment motions raised multiple arguments, and courts only granted 17.9% of these motions in part or whole on qualified immunity grounds. Ultimately, qualified immunity resulted in the dismissal of only 3.9% of the cases in which the defense could be raised. Although the threat of qualified immunity may cause some people not to sue, this selection effect does not explain why qualified immunity plays such a limited role in the resolution of motions raising qualified immunity and in the disposition of cases that are filed.

The Supreme Court's decisions suggest another theory that could partially explain why qualified immunity disposes of few cases: because courts improperly deny defendants' qualified immunity motions. For this reason, and because of the "importance of qualified immunity 'to society as a whole,'" the Supreme Court has taken the unusual step of "often correct[ing] lower courts when they wrongly subject individual officers to liability."[126] Yet qualified immunity grant rates are lower than expected even in the circuits generally believed to be the most amenable to qualified immunity: 33.3% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Southern District of Texas, and 22.5% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Middle District of Florida.[127] Moreover, only 9.2% of cases from the Southern District of Texas and 6.7% of cases from the Middle District of Florida were actually dismissed on qualified immunity grounds. Unless one believes that the Southern District of Texas and the Middle District of Florida, as well as the Fifth and Eleventh Circuits, are regularly flouting the letter and spirit of the Supreme Court's qualified immunity doctrine, error in the lower courts is an unconvincing – or at least incomplete – explanation for these findings.

My data suggest two additional explanations for why qualified immunity disposes of so few cases: the doctrine is not well suited to dismiss many claims before trial, and qualified immunity is often unnecessary to serve its intended role.

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125. *See supra* Table 6.

126. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

127. *See supra* Table 6.

1. *Qualified Immunity Is Ill Suited To Dispose of Cases*

Qualified immunity motions are infrequently dispositive in part because the doctrine is ill suited to dispose of many cases before trial. Although qualified immunity doctrine creates a seemingly insurmountable barrier for plaintiffs, the standards for review at the motion to dismiss and summary judgment stages may prevent courts from granting defendants' motions. At the motion to dismiss stage, a defendant's qualified immunity motion should be denied so long as the plaintiff has plausibly alleged a violation of a clearly established right. As one district judge from the Middle District of Tennessee observed,

> The rationale for the existence of qualified immunity is to avoid imposing needless discovery costs upon government officials, so determining whether the immunity applies must be made at an early stage in the litigation. At the same time, the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court. Since plaintiffs are not required to anticipate a qualified immunity defense in their pleadings, and since at this stage of the litigation the exact contours of the right at issue—and thus the degree to which it is clearly established—are unclear, the Sixth Circuit advises that qualified immunity should usually be determined pursuant to a summary judgment motion rather than a motion to dismiss.[128]

This is a common refrain in circuit courts across the country[129] and decisions in my dataset.[130]

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128. Turner v. Weikal, No. 3:12-cv-0915, 2013 WL 3272481, at *3 (M.D. Tenn. June 27, 2013) (internal quotation marks and citations omitted).

129. *See, e.g.*, Wesley v. Campbell, 779 F.3d 421, 433-34 (6th Cir. 2015); Owens v. Balt. City State's Attorneys' Office, 767 F.3d 379, 396 (4th Cir. 2014); Newland v. Reehorst, 328 F. App'x 788, 791 n.3 (3d Cir. 2009); Field Day, LLC v. Cty. of Suffolk, 463 F.3d 167, 191-92 (2d Cir. 2006); St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002); Alvarado v. Litscher, 267 F.3d 648, 651-52 (7th Cir. 2001); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976).

130. *See, e.g.*, Order Denying Motion to Dismiss at 2-3, Dudley v. Borough of Upland, No. 2:12-cv-5651 (E.D. Pa. July 19, 2013), ECF No. 33 ("Without discovery, I cannot determine whether the Officers acted reasonably. For instance, it is unclear what the Officers knew about the warrant when they arrested Plaintiff and whether the warrant bore an expiration date. Viewing the factual allegations in the light most favorable to Plaintiff, it may have been objectively unreasonable that the Officers failed to look into the validity of a 2 ½-year-old warrant. Accordingly, I cannot yet determine whether the Officers are entitled to qualified immunity." (citation omitted)); Report and Recommendation at 15, Coldwater v. City of Clute, No. 3:12-cv-0028 (S.D. Tex. Aug. 30, 2012), ECF No. 41 ("Accepting the allegations in

District courts also find that factual disputes prevent resolution on qualified immunity grounds at summary judgment. Alan Chen has argued that the Supreme Court's qualified immunity decisions "have embedded a central paradox into the doctrine": although the Court repeatedly writes that "qualified immunity claims can and should be resolved at the earliest stages of litigation," it ignores the fact that these determinations "inherently entail nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context."[131] My data offer anecdotal evidence to support Chen's observation. In the five districts in my study, courts repeatedly found that factual disputes prevented summary judgment on qualified immunity grounds.[132] In these decisions, courts duly recited the benefits of resolving

her Amended Complaint as true, the Court cannot conclude, at least at this juncture in the litigation, that the conduct of these Defendants was objectively reasonable in the light of then clearly established law."); Pippin v. Kirkland, No. 8:12-cv-0776, 2012 WL 12903175, at *2 (M.D. Fla. July 3, 2012) ("[A]ccepting all factual allegations in the Complaint as true, it is not possible to determine whether Defendant Kirkland is entitled to qualified immunity."); Mantell v. Health Prof'ls Ltd., 5:11-cv-1034, 2012 WL 28469, at *4 (N.D. Ohio Jan. 5, 2012) ("[T]he Court takes no stance on whether discovery will ultimately support these allegations against any of the moving defendants and the issues may appropriately be revisited during summary judgment practice in this matter. However, for the purposes of a motion to dismiss, the complaint properly pleads deliberate indifference and precludes a finding of qualified immunity *at this time*."); Nishi v. Cty. of Marin, No. 4:11-cv-0438, 2011 WL 1807043, at *2 (N.D. Cal. May 11, 2011) ("[R]esolution of the qualified immunity defense frequently raises issues of fact that are more appropriately determined at a later stage. While such a defense may thus very well prove viable at a future stage of these proceedings, it does not present an adequate basis for dismissal here.").

131. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006); *see also* Jeffries, *supra* note 61, at 252-53.

132. *See, e.g.*, Martin v. City of Reading, 118 F. Supp. 3d 751, 765-67 (E.D. Pa. 2015) ("[A]s the Court of Appeals for the Third Circuit recently observed in a case involving a claim of excessive force that arose out of the use of a Taser, 'if there are facts material to the determination of reasonableness in dispute, then that issue of fact should be decided by the jury.' . . . Thus, affording Defendant Errington qualified immunity at this time is inappropriate in light of the genuine dispute between the parties of the facts bearing on his entitlement to immunity." (quoting Geist v. Ammary, 617 F. App'x 182, 185 (3d Cir. 2015))); Hayes v. City of Tampa, No. 8:12-cv-2038, 2014 WL 4954695, at *8 (M.D. Fla. Oct. 1, 2014) ("[C]onstruing the record as a whole in favor of Hayes, whether Hayes's 'stance, demeanor and facial expression' justified Miller's use of a taser is a genuine issue of material fact."); McKissic v. Miller, 37 F. Supp. 3d 907, 918 (N.D. Ohio 2014) ("[W]hen the facts as alleged by the Plaintiff and supported by some evidentiary materials, are taken to be true, there remains a question of fact as to whether Officer Miller's actions constituted excessive force in violation of the Fourth Amendment of the U.S. Constitution."); Bui v. City of San Francisco, 61 F. Supp. 3d 877, 902 (N.D. Cal. 2014) ("[B]ased on the evidence presented by both sides . . . the court cannot decide as a matter of law whether it would have been 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' In these circumstances, the

qualified immunity at the earliest possible stage and qualified immunity's intended role as protection from discovery and trial. Yet the same courts found that factual disputes made summary judgment inappropriate.

The Supreme Court's recent decision in *White v. Pauly* provides additional anecdotal evidence of this underappreciated phenomenon. In *White v. Pauly,* the Supreme Court held that it would be appropriate to grant summary judgment on qualified immunity grounds to an officer who shot and killed a suspect without first identifying himself and ordering the suspect to drop his gun, because "[n]o settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [the defendant] confronted here."[133] The decision has been described as evidence that the Supreme Court "wants fewer lawsuits against police to go forward."[134] This may well be true. Yet the decision in *White v. Pauly* did not end Daniel Pauly's lawsuit; as Justice Ginsburg notes in her concurrence, the Court's decision "leaves open the propriety of denying summary judgment" based on various factual disputes about the officer's conduct.[135]

Plaintiffs' decisions about how to frame their cases also make qualified immunity ill suited to dispose of many cases. Defendants could not raise a qualified immunity defense in 8.4% of the cases in my study because the plaintiffs did not sue an individual officer for money damages.[136] Even in cases in which defendants could raise qualified immunity, plaintiffs' other pleading decisions sometimes diminished the impact of qualified immunity. In the vast majority of cases asserting claims against individual officers for money damages, plaintiffs also included claims against municipalities, claims for injunctive relief, and/or state law claims that could not be dismissed on qualified immunity grounds.[137] Even when a plaintiff brings a claim for damages against an indi-

court denies Defendants' motion insofar as it asks the court conclude that the officers are entitled to qualified immunity." (citation omitted) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001))); Nunez v. City of Corpus Christi, No. 2:12-cv-0092, 2013 WL 4040373, at *3 (S.D. Tex. Aug. 7, 2013) (denying qualified immunity because "there is considerable dispute regarding the timing of Hobbs' shots, the position of the vehicle at the time the shots were fired, and the immediacy of the threat posed to Officer Hobbs").

133. 137 S. Ct. 548, 552 (2017).

134. Feldman, *supra* note 5.

135. *Pauly*, 137 S. Ct. at 553 (Ginsburg, J., concurring).

136. *See supra* Table 1.

137. In the Southern District of Texas, defendants could raise qualified immunity in 106 cases in my dataset; in ninety-nine of those cases, plaintiffs also named municipalities as defendants. In the Middle District of Florida, defendants could raise qualified immunity in 155 cases in my dataset; in 149 of those cases, plaintiffs also named municipalities as defendants. In the Northern District of Ohio, defendants could raise qualified immunity in 139 cases in my da-

vidual defendant (for which qualified immunity is available), the defendant raises a qualified immunity defense, and the court grants the motion, claims against the municipality, claims for injunctive relief, and state law claims may remain.[138]

2. *Qualified Immunity Is Unnecessary To Dispose of Cases*

My data also suggest that qualified immunity may lead to the dismissal of few cases because cases are so often resolved on other grounds. Qualified immunity could not be raised in 126 (10.7%) of the cases in my study because the judges dismissed the cases sua sponte before the defendants could answer or otherwise respond.[139] In these cases, qualified immunity doctrine was unnecessary to shield defendants from discovery and trial.

Qualified immunity was also often unnecessary to dispose of cases at the motion to dismiss stage. Defendants in the cases in my dataset clearly held this view: even when defendants could raise qualified immunity at the motion to dismiss stage, they often chose not to do so.[140] More often than not, when defendants moved to dismiss or for judgment on the pleadings, they did not include a qualified immunity argument. Instead, defendants moved to dismiss for failure to plead plausible claims for relief or failure to assert a constitutional violation, among other grounds. Even when defendants raised qualified immunity at the motion to dismiss stage, and courts concluded that the cases should be dismissed, courts often resolved the motions on other grounds. Courts granted, in whole or part, seventy-nine (51.3%) out of the 154 motions to dismiss or for judgment on the pleadings that raised qualified immunity. Of

taset; in 129 of those cases, plaintiffs also named municipalities as defendants. In the Northern District of California, defendants could raise qualified immunity in 219 cases in my dataset; in 209 of those cases, plaintiffs also named municipalities as defendants. In the Eastern District of Pennsylvania, defendants could raise qualified immunity in 360 cases in my dataset; in 357 of those cases, plaintiffs also named municipalities as defendants.

138. *See supra* notes 102-104 and accompanying text (providing examples of these cases from my dataset).

139. *See supra* Table 12. In addition to the 105 cases dismissed sua sponte that were brought against individual defendants, *see supra* Table 1, twenty-one cases brought against municipalities or seeking injunctive relief were also dismissed before defendants answered or otherwise responded. These dismissals were most often based on the court's power to dismiss frivolous pro se claims sua sponte, but others were dismissed at this early stage for failure to prosecute or lack of subject matter jurisdiction. Cases dismissed for failure to prosecute or remanded to state court *after* defendants responded to the complaints are counted separately in Table 12.

140. *See supra* Figure 1; *supra* note 88 and accompanying text.

those seventy-nine grants, twenty-one (26.6%) were granted on qualified immunity grounds, and fifty-eight (73.4%) were granted on grounds other than qualified immunity.[141]

Qualified immunity played a more substantial role at summary judgment. Defendants raised qualified immunity arguments in most of their summary judgment motions.[142] And when courts granted defendants' summary judgment motions in whole or part, they relied on qualified immunity 39.7% of the time.[143] Still, courts decided a clear majority of the motions on other grounds. Most often, these summary judgment motions were granted in whole or part because the plaintiff could not establish a genuine dispute about a material question of fact. This finding should not come as a surprise to at least one member of the Court—Justice Kennedy noted in *Wyatt v. Cole* that the Court's summary judgment decisions reduced the need for qualified immunity to shield government officials from trial. As Justice Kennedy explained:

> *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. However, subsequent clarifications to summary-judgment law have alleviated that problem . . . . Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.[144]

When the Supreme Court discusses qualified immunity, it appears to presume that qualified immunity is the only barrier standing between government officials and discovery and trial. Instead, my study illustrates that there are other tools that parties can—and often do—use to resolve Section 1983 cases before trial.[145]

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141. *See supra* Table 7. I include in the latter category cases where qualified immunity was the alternate ground for decision and cases where the court's reasoning was unclear.

142. *See supra* Figure 2.

143. *See supra* Table 8. Summary judgment was granted in whole or in part 146 times. Of those cases, the court relied on qualified immunity fifty-eight times.

144. Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (citations omitted).

145. *Accord* Fallon, *supra* note 59, at 504-05 (observing that other mechanisms can be used to achieve the goals of qualified immunity).

In this Section, I have offered some possible explanations for why cases are infrequently dismissed on qualified immunity grounds. This phenomenon is not solely attributable to plaintiffs' decisions not to file cases in which qualified immunity motions might be successful. Nor can lower courts be shouldered with all the blame for the low rate of qualified immunity dispositions. Instead, my data suggest that qualified immunity doctrine is ill suited in some cases and unnecessary in others to serve its intended role.

My data also make clear that qualified immunity's role in Section 1983 litigation is the product of decisions made by multiple actors—judges, defendants, plaintiffs, and the litigants' attorneys. Moreover, there is at least some evidence to suggest that district judges' varying inclinations to grant qualified immunity motions may influence defendants' and plaintiffs' litigation decisions. In jurisdictions with judges who most often granted defendants' qualified immunity motions—the Southern District of Texas and the Middle District of Florida—defendants brought qualified immunity motions more frequently, and plaintiffs more frequently crafted their cases in ways that prevented defendants from raising the defense. Conversely, in jurisdictions with judges who less frequently granted defendants' qualified immunity motions—the Eastern District of Pennsylvania and the Northern District of California—defendants less frequently brought qualified immunity motions, and plaintiffs less frequently crafted their cases to avoid the defense. A complete understanding of the role of qualified immunity in constitutional litigation against law enforcement must attend to regional differences in the dynamic interactions between judges, defendants, and plaintiffs. I plan to explore these interactions in future work.

C. Implications for the Balance Struck by Qualified Immunity

The Supreme Court has explained that qualified immunity is intended to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[146] Many have argued, and I agree, that the Court's qualified immunity doctrine puts a heavy thumb on the scale in favor of government interests, and disregards the interests of individuals whose rights have been violated.[147] My research offers an additional reason to believe that the Supreme Court has gotten the balance wrong: qualified immunity doctrine does not appear to be necessary or well

146. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

147. *See, e.g.*, Blum, Chemerinsky & Schwartz, *supra* note 8 (criticizing the Court's qualified immunity jurisprudence along these lines); Reinhardt, *supra* note 7 (same).

suited to protect government officials "from harassment, distraction, and liability when they perform their duties reasonably."[148] This observation makes it even more difficult to justify the burdens the doctrine appears to place on plaintiffs.

1. *Interests in Protecting Government Officials*

The Supreme Court explained in *Harlow* that qualified immunity was necessary to protect government officials from four harms: 1) "the expenses of litigation"; 2) "the diversion of official energy from pressing public issues"; 3) "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'"; and 4) "the deterrence of able citizens from acceptance of public office."[149] The Court has relied on no empirical evidence to support its conclusions that these threats exist, or that qualified immunity can protect against them. Although questions remain about the government interests served by qualified immunity, this study and my prior research suggest that qualified immunity doctrine is often unfit to protect against some of these harms, and often unnecessary to protect against others.

The first—and frequently repeated—justification for qualified immunity is that it protects government officials from the burdens of financial liability. But my prior research has shown that qualified immunity is unnecessary to serve this role—virtually all law enforcement defendants are provided with counsel free of charge, and are indemnified for settlements and judgments entered against them. In the six-year period from 2006 to 2011, law enforcement officers in forty-four of the seventy largest law enforcement agencies paid just 0.02% of the dollars awarded to plaintiffs in police misconduct suits.[150] In thirty-seven small and midsized agencies, no officer contributed to settlements or judgments to plaintiffs awarded during this period. Officers were indemnified even when they were disciplined, fired, and criminally prosecuted for their misconduct. And no officer paid a penny of the punitive damages awarded to plaintiffs in these jurisdictions. I could confirm only two jurisdictions in which officers contributed to settlements and judgments during the study period—New York City and Cleveland.[151] In these jurisdictions, the median contribu-

148. *Pearson*, 555 U.S. at 231.

149. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alteration in original) (citations omitted).

150. *See* Schwartz, *supra* note 16, at 890.

151. *See id.* at 926-29. An officer was not indemnified for a $300 punitive damages judgment in Los Angeles, but the officer never paid the award. And officials believed—but could not con-

tion was $2,250, and no officer contributed more than $25,000.[152] Given this evidence, qualified immunity cannot be justified as a means of protecting officers from personal financial liability.

In recent years, the Supreme Court has described "the 'driving force' behind creation of the qualified immunity doctrine" to be resolving "'insubstantial claims' against government officials . . . prior to discovery."[153] But qualified immunity resulted in the dismissal of just 0.6% of the cases in my dataset before discovery, and resulted in the dismissal of just 3.2% of the 1,183 cases in my dataset before trial.

Indeed, qualified immunity may actually increase the costs and delays associated with Section 1983 litigation. Although qualified immunity terminated only 3.9% of the 979 cases in my dataset in which qualified immunity could be raised, the defense was in fact raised by defendants in more than 37% of these cases—and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals.[154] Each time qualified immunity is raised, it must be researched, briefed, and argued by the parties and decided by the judge. And litigating qualified immunity is no small feat. John Jeffries describes qualified immunity doctrine as "a mare's nest of complexity and confusion."[155] Lower courts are "hopelessly conflicted both within and among themselves" as a result.[156] One circuit court judge reported that "[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face."[157]

The time and effort necessary to resolve qualified immunity motions could nevertheless further the goals of qualified immunity doctrine if it effectively protected defendants from discovery and trial. But in the five districts in my study, just 8.6% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals.[158] The remaining 91.4% of qualified immunity motions brought by defendants required the parties and judges to

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firm—that employees of the Jacksonville Sheriff's Office and the Illinois State Police may each have been required to contribute to one settlement during the study period.

152. *Id.* at 939.

153. *Pearson*, 555 U.S. at 231 (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

154. *See supra* Tables 4 & 5.

155. Jeffries, *supra* note 6, at 852.

156. Blum, *supra* note 114, at 925 (footnotes omitted).

157. Wilson, *supra* note 61, at 447; *see also* Blum, *supra* note 114, at 945-46 (quoting two judges' descriptions of the complexities of determining whether a law is clearly established).

158. *See supra* Table 11 (thirty-eight of the 440 qualified immunity motions raised by defendants resulted in case dismissals).

dedicate time and resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial.

Even in the cases in which qualified immunity motions resulted in case dismissals, it is far from certain that qualified immunity saved the parties and the courts time. As Alan Chen has observed, when considering the efficiencies of qualified immunity, "the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case . . . . [T]he pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense."[159] In this study, I have not calculated how much time was spent litigating qualified immunity motions, or compared that time with the amount of time spent preparing for and conducting a trial. Yet—given the complexity of qualified immunity doctrine, the use of interlocutory appeals of qualified immunity denials, the fact that most trials in my docket dataset lasted just a few days, and the possibility that a case will settle instead of going to trial even when qualified immunity is denied—the aggregate benefits of qualified immunity do not necessarily outweigh its costs for government officials.

In *Pearson*, the Supreme Court wrote that the *Saucier* two-step qualified immunity analysis "'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily.'"[160] Given the costs and delays associated with qualified immunity motion practice and the infrequency with which qualified immunity motions terminate Section 1983 cases, the doctrine arguably disserves its own purposes.

Although qualified immunity doctrine appears to do little to shield defendants from burdens associated with litigation in filed cases—and may in fact increase the amount of time spent on a substantial number of those cases—my data leave open the possibility that qualified immunity doctrine shields government officials from burdens associated with discovery and trial in other ways, namely by causing people never to file insubstantial claims or to settle them quickly.[161] The possibility that qualified immunity doctrine serves its intended purpose in these ways, however, does not mean that it actually does. At

159. Chen, *supra* note 57, at 100.

160. Pearson v. Callahan, 555 U.S. 223, 237 (2009) (alteration in original) (quoting Brief for National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, *Pearson*, 555 U.S. 223 (No. 07-751)).

161. *See supra* notes 117-122 and accompanying text (discussing case selection and settlement behavior effects).

least two pressing questions would have to be answered before qualified immunity doctrine could be justified on these grounds.

First, what are the merits of cases that are never filed or settled quickly because of qualified immunity? If qualified immunity doctrine discourages people from filing or pursuing insubstantial cases, the doctrine is meeting its express goals.[162] But if the doctrine discourages people from filing or pursuing meritorious cases because the briefing and interlocutory appeals associated with qualified immunity would be too expensive, the doctrine is not sorting cases in the way anticipated by the Court. Although more research is necessary to answer this question, available evidence offers reason for concern. Alexander Reinert's interviews with attorneys who bring *Bivens* actions suggest that people with strong claims may sometimes be unable to find a lawyer because the cost of litigating qualified immunity is too high or because the conduct at issue has not been clearly established by prior cases.[163] Some people who do file their cases may settle at a discount, not because their cases are weak but because they cannot afford to litigate qualified immunity in the district court or on interlocutory appeal.

Second, how frequently does qualified immunity cause plaintiffs not to file or to settle insubstantial cases? The costs associated with litigating qualified immunity and the difficulty of overcoming a qualified immunity motion may cause plaintiffs not to file some insubstantial cases. But other, independent considerations may cause plaintiffs not to file such cases, including rigorous pleading requirements, stringent standards for proving underlying constitutional violations, and minimal potential damages awards. Without further study, it is not possible to conclude that qualified immunity, rather than these alternative considerations, is responsible for plaintiffs' decisions to settle or never file insubstantial cases.

In short, there is limited evidence to support the hypothesis that qualified immunity serves its purpose through screening cases or coercing settlement. Indeed, some evidence suggests that the doctrine may be discouraging plaintiffs from filing or pursuing meritorious cases because qualified immunity would take too long or cost too much to litigate. Our existing knowledge about qualified immunity's effects on filing and settlement decisions cannot justify the doctrine on these grounds.

The Supreme Court has mentioned, but dwelled little upon, two other possible benefits of qualified immunity doctrine—that it lessens "the danger that

162. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial).

163. *See* Reinert, *supra* note 118, at 491-95.

fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" and that it mitigates "the deterrence of able citizens from acceptance of public office."[164] The available evidence casts doubt on these rationales as well. The Court has written that dangers of overdeterrence should dissipate for officials who are not financially responsible for settlements and judgments.[165] Consistent with this observation, studies have found that "the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices."[166] Further, civil liability does not appear to play a sizable role in people's decisions to apply to become police officers. Police departments around the country report difficulties finding recruits, but the long list of reasons police officials believe people are not applying does not include the threat of being sued.[167] These speculative benefits cannot justify qualified immunity's highly restrictive standards.

Perhaps the Court believes that qualified immunity doctrine serves other interests that it has failed to mention. Even if officers are almost always indemnified, and cases are rarely dismissed on qualified immunity grounds, qualified

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164. *Harlow*, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

165. Owen v. City of Independence, 445 U.S. 622, 655-56 (1980) (explaining that the overdeterrence rationale for qualified immunity "loses its force" when "the threat of personal liability is removed").

166. VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006) (citing several studies); *see also* Schwartz, *supra* note 16, at 942-43 (discussing studies of civil liability as a deterrent to aggressive police behaviors).

167. *See, e.g.*, Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts To Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015), http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081 [http://perma.cc/4MFX-3ZE9]; Edmund DeMarche, *'Who Needs This?' Police Recruits Abandon Dream Amid Anti-Cop Climate*, FOX NEWS (Sept. 2, 2015), http://www.foxnews.com/us/2015/09/02/who-needs-this-police-recruits-abandon-dream-amid-anti-cop-climate.html [http://perma.cc/DAC4-EQR3]; Daniel Denvir, *Who Wants To Be a Police Officer?*, CITYLAB (Apr. 21, 2015), http://www.citylab.com/crime/2015/04/who-wants-to-be-a-police-officer/391017 [http://perma.cc/RB27-LEUZ]; Mori Kessler, *Thinning Blue Line: Police See Declines in Applicants*, ST. GEORGE NEWS (Dec. 13, 2015), http://www.stgeorgeutah.com/news/archive/2015/12/13/mgk-thinning-blue-line-police-decline [http://perma.cc/L2ENVRE2]; Oliver Yates Libaw, *Police Face Severe Shortage of Recruits*, ABC NEWS (July 10, 2016), http://abcnews.go.com/US/story?id=96570 [http://perma.cc/NJ27-866M]; John Vibes, *Surprised? Some Police Departments Experiencing Sharp Decline in New Applicants*, FREE THOUGHT PROJECT (Feb. 20, 2015), http://thefreethoughtproject.com/good-news-areas-find-people-police [http://perma.cc/7KFB-RABB]; William J. Woska, *Police Officer Recruitment: A Public-Sector Crisis*, POLICE CHIEF (Apr. 2016), http://www.policechiefmagazine.org/police-officer-recruitment-a-public-sector-crisis [http://perma.cc/S57T-5T5N].

immunity doctrine may somehow reduce the costs of litigation for the municipalities that end up paying the settlements and judgments on behalf of their officers.[168] Qualified immunity doctrine may encourage the development of constitutional law because it allows courts to announce new constitutional rules without fear of subjecting defendants to financial liability.[169] In this Article, I do not evaluate the sensibility of—or empirical support for—these alternative justifications for qualified immunity. Neither has been relied upon by the Court. If these or other policy interests motivate the Supreme Court's qualified immunity jurisprudence, the Court should be explicit about those motivations so that courts, practitioners, and scholars can evaluate the sensibility of these interests and measure the extent to which qualified immunity advances them. Until then, we are left with the justifications for qualified immunity doctrine that the Court has offered. Available evidence suggests that the doctrine is unnecessary to serve some of qualified immunity's key goals and ill suited for others.

2. *Interests in Government Accountability*

My research indicates that filed lawsuits are rarely dismissed on qualified immunity grounds. As I have argued, this finding suggests that qualified immunity doctrine rarely achieves its intended function as a shield for government officials against discovery and trial in filed cases. What are the implications of this finding for the other side of qualified immunity's balance, described by the Court both as "the importance of a damages remedy to protect the rights of citizens"[170] and as "the need to hold public officials accountable when they exercise power irresponsibly"?[171] Commentators have long criticized qualified immunity doctrine for protecting government officials at the expense of Section 1983's accountability goals. If qualified immunity is not doing much to protect government officials, does that allay concerns that the doctrine compromises government accountability? In other words, do my data suggest that qualified immunity does little of great significance, either to defendants' benefit or to plaintiffs' detriment?

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168. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007).

169. *See, e.g.*, Jeffries, *supra* note 61, at 247 ("Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout.").

170. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 504-05 (1978)).

171. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

Evidence that few cases are dismissed on qualified immunity grounds suggests that the direst descriptions of qualified immunity's impact on plaintiffs perhaps go too far. Critics assert that qualified immunity closes the courthouse door for plaintiffs.[172] And there is no shortage of decisions by the Supreme Court and lower courts dismissing cases on qualified immunity grounds.[173] Yet, my study suggests that qualified immunity doctrine appears to close the courthouse door far less frequently than critics have assumed—at least once a case is filed. My findings do not, however, undermine other concerns raised about the impact of qualified immunity on plaintiffs' claims. Qualified immunity could significantly damage law enforcement accountability without protecting officials from the burdens of discovery and trial.

First, qualified immunity doctrine may discourage people from filing their cases or may cause them to settle or withdraw their claims.[174] If qualified immunity had this effect only on insubstantial cases, the doctrine would be achieving its intended role, albeit in a manner unexpected by the Court. But if qualified immunity is causing people not to file or to settle meritorious cases, as available anecdotal evidence suggests, then the doctrine is preventing people from vindicating their rights and holding government accountable.[175]

Moreover, my findings do not undermine other common critiques of the doctrine. Qualified immunity doctrine has been criticized by courts and scholars alike for being confusing and difficult to apply, and leading to inconsistent adjudications.[176] These characteristics of qualified immunity doctrine may well increase the time it takes courts to decide qualified immunity motions, even as the decisions are infrequently dispositive.[177]

In addition, many are critical of the Court's decision in *Pearson* to allow lower courts to grant qualified immunity without first assessing whether a defendant violated the constitutional or statutory rights of the plaintiff.[178] Their fear is that if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitu-

172. *See supra* notes 6-8 and accompanying text.

173. *See supra* note 3 and accompanying text.

174. *See supra* notes 162-163 and accompanying text.

175. *See supra* notes 162-163 and accompanying text.

176. *See supra* notes 155-159 and accompanying text.

177. *See* Chen, *supra* note 57, at 99 ("Plaintiffs, defendants, and trial courts are likely to expend substantial resources simply litigating the qualified immunity defense—an elaborate sideshow, independent of the merits, that in many cases will do little to advance or accelerate resolution of the legal claims.").

178. *See supra* Section I.B.2 (describing *Pearson*).

tional right at issue will never become clearly established. This catch-22 may lead to constitutional uncertainty and stagnation, making it more difficult for plaintiffs to prevail on constitutional claims and offering little guidance to government officials about the scope of constitutional rights.[179] Scholars who have studied the impact of *Pearson* have found some evidence to support these concerns.[180] The fact that few cases are dismissed on qualified immunity grounds is immaterial to this critique. The Supreme Court's decision in *Pearson* to allow lower courts to grant qualified immunity without deciding whether a right has been violated may still lead to constitutional uncertainty, particularly in cases involving new technologies or practices.[181]

Finally, many have argued that the Supreme Court's qualified immunity decisions protect bad actors. The Court's disregard of subjective intent protects officers who act in bad faith, so long as their conduct does not violate clearly established law.[182] In addition, a government official who has acted in a clearly unconstitutional manner can be shielded from liability simply because no prior case has held similar conduct to be unconstitutional. The Supreme Court's re-

179. *See, e.g.*, Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 502-06 (2009); Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120; James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1605-06 (2011).

180. *See* Nielson & Walker, *supra* note 114; *see also* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 428 & n.121 (2009) (predicting that *Pearson* will lead to constitutional stagnation); Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468 (2011) (finding that after *Pearson* district courts often answered both steps of the qualified immunity analysis, but circuit courts more often decided qualified immunity motions without ruling on the underlying constitutional right); *cf.* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011) (finding that circuit courts followed the *Saucier* two-step process "most of the time").

181. *See, e.g.*, Matthew Slaughter, *First Amendment Right To Record Police: When Clearly Established Law Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101 (2015) (describing circuit variation in analysis of the right to record the police); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285 (2012) (describing circuit variation in analysis of qualified immunity for claims involving electronic control devices).

182. For example, in *Ashcroft v. al-Kidd*, the Supreme Court held that the then-Attorney General John Ashcroft was entitled to qualified immunity, even though he authorized federal prosecutors to use the material-witness statute pretextually, because qualified immunity doctrine "demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." 563 U.S. 731, 740 (2011).

cent decisions have made it increasingly difficult to meet this standard.[183] It is, as John Jeffries has written, "as if the one-bite rule for bad dogs started over with every change in weather conditions."[184] Even this critique of qualified immunity is left largely intact by my findings. Qualified immunity's disregard for officials' subjective intent, and the need for precedent that "place[s] the statutory or constitutional question beyond debate,"[185] may insulate bad actors from financial liability, but still expose them to discovery and trial if other claims or defendants remain.

McKay v. City of Hayward,[186] a case from the Northern District of California in my docket dataset, illustrates how qualified immunity can impair government accountability in these ways without shielding defendants from discovery or trial. On May 29, 2011, officers from the Hayward Police Department used a police dog to track an armed suspect who had robbed a restaurant.[187] The dog guided the officers to an eight-foot wall. Without any warning, the officers lifted the dog over the wall. On the other side of the wall was the backyard of a mobile home belonging to Jesse Porter, an 89-year-old who had no connection to the robbery. The dog bit Porter on the leg, leaving a wound so severe that Porter's leg had to be amputated. Mr. Porter was then moved into a residential

183. Despite the confusion in the doctrine, the Supreme Court's most recent decisions suggest that it is very difficult to show that conduct violates "clearly established law." Although the Court once held that the obviousness of a constitutional violation can defeat qualified immunity even without a case on point, *see* Hope v. Pelzer, 536 U.S. 730 (2002), in recent years the Court's primary focus has been whether a prior court has held the right to be clearly established, *see* Blum, Chemerinsky & Schwartz, *supra* note 8, at 652-53. The Court's recent decisions have made it difficult to clearly establish the law in other ways as well. In 1999, the Court explained that a plaintiff could show the law was clearly established by pointing to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority." Wilson v. Layne, 526 U.S. 603, 617 (1999). Yet in more recent decisions, the Court has backed away from this position; it now only assumes *for the sake of argument* that controlling circuit authority or a consensus of cases of persuasive authority can clearly establish the law. *See* Kinports, *supra* note 2, at 70-71 (describing this shift in the law). The Court's most recent decisions also suggest that the facts of the prior decision must closely resemble those of the instant case. The Court has repeatedly assured plaintiffs that it "do[es] not require a case directly on point," but requires that "existing precedent must have placed the statutory or constitutional question beyond debate." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (citing *al-Kidd*, 563 U.S. at 741). In recent years, the Court has reversed several lower court decisions for relying on prior precedent that established constitutional principles at too-general a level. *See, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017); *Mullenix*, 136 S. Ct. 305.

184. Jeffries, *supra* note 61, at 256.

185. *Mullenix*, 136 S. Ct. at 308 (citing *al-Kidd*, 563 U.S. at 741).

186. No. 3:12-cv-1613 (N.D. Cal. Mar. 30, 2012).

187. The facts of the case are taken from the district court's summary judgment decision. *See* McKay v. City of Hayward, 949 F. Supp. 2d 971, 975-76 (N.D. Cal. 2013).

care facility, where he died two months later. Mr. Porter's children sued the involved officers and the City of Hayward under federal and state law.

At summary judgment, the district court in *McKay* granted the officers qualified immunity.[188] The court found that, to survive summary judgment, the plaintiffs had to be able to show that the failure to warn before seizure by a police dog constitutes a Fourth Amendment violation. The court surveyed Ninth Circuit cases involving police dogs and found that "[n]o Ninth Circuit case holds explicitly that failure to warn before seizure by a police dog constitutes a violation of the Fourth Amendment."[189] The court surveyed other circuits and found some variation: the Fourth and Eighth Circuits had held that the failure to give a warning before using a police dog violates the Fourth Amendment, but the Eleventh, Seventh, and Tenth Circuits had held that failure to warn before deploying a police dog was "not dispositive of the reasonableness of seizing an individual with a police dog."[190] Because of this variation among circuits, the court in the Northern District of California concluded that that the unconstitutionality of the officers' conduct had not been clearly established.

The decision granting qualified immunity in *McKay* did not shield government officials from burdens associated with either discovery or trial. In McKay's case, qualified immunity was raised at summary judgment, after the officers had already participated in discovery. The motion was granted less than two weeks before trial was scheduled to begin.[191] Moreover, even after the court granted qualified immunity to the individual officers, the officers still faced the prospect of trial. In addition to the Section 1983 claims against the two individual officers, the plaintiffs brought state law claims against the individual officers and state and federal claims against the City—the qualified immunity defense did not apply to any of these claims.[192] In the days following the court's summary judgment decision, the parties drafted and submitted voir dire questions, multiple motions in limine, and briefs regarding whether the

188. *Id.* at 985.

189. *Id.* at 983.

190. *Id.* at 984.

191. *See* Case Management Minutes, *McKay*, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF No. 67.

192. *McKay*, 949 F. Supp. 2d at 985, 988.

trial should be separated into three stages.[193] The case settled and the court entered a conditional dismissal the day trial was scheduled to begin.[194]

Although the district court's qualified immunity decision in *McKay* did not shield officials from discovery and was not formally the reason the case did not go to trial, it did negatively affect interests in government accountability. The qualified immunity motion likely increased the amount of time spent by the attorneys for the plaintiffs and defendants.[195] The grant of qualified immunity in *McKay* may also have ripple effects that extend far beyond the parties to the litigation. The district court found that it was not clearly established in the Ninth Circuit that deploying police dogs without a prior warning violates the Constitution. This decision may cause lawyers to decline to represent people with similar claims. One could argue that qualified immunity is serving its intended role by discouraging people from bringing Section 1983 cases when the underlying constitutional rights have not been clearly established. But this position goes further than the Court's own justification for qualified immunity doctrine: to protect government officials from insubstantial claims.[196] That no prior court has decided a given constitutional issue does not imply that a case raising it lacks merit.

Uncertainty about the constitutionality of deploying a police dog without a prior warning may also influence police departments' policy and training decisions. Although the Supreme Court appears confident that police departments can regulate themselves,[197] police officials look to court decisions to guide their policies and trainings.[198] Were, for example, the Ninth Circuit to hold that

193. *See McKay*, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF Nos. 76-79.

194. *See* Order of Conditional Dismissal, *McKay*, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF No. 81.

195. In some cases, the grant of qualified immunity might cause plaintiffs to settle instead of going to trial or cause plaintiffs to settle for an amount smaller than they would have otherwise accepted. In this case, the plaintiffs' attorney reported that the qualified immunity grant had a "negligible" impact on the value of the case because the *Monell* claim remained and, "[u]nlike many civil rights cases, [the plaintiffs] had good evidence to support the *Monell* claim." E-mail from Matthew D. Davis, Attorney for Plaintiffs in *McKay*, 949 F. Supp. 2d 971, to author (Nov. 28, 2016, 9:17 AM) (on file with author).

196. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial).

197. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598-99 (2006) (asserting that the rise of police professionalism and internal discipline reduces the need for the exclusionary rule to deter police misbehavior).

198. For examples of instances in which court decisions have influenced police department policies and trainings, see POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (Mar. 2016), http://www.policeforum.org/assets/30%20guiding

officers should give prior warnings before using police dogs, departments in the jurisdiction of the Ninth Circuit would likely train their officers to issue warnings under these circumstances. Without such a decision, and with the *McKay* court's conclusion that there is no clearly established constitutional right to such a warning, departments may be less likely to train their officers to give such warnings.[199] These costs to government accountability accrue whether or not qualified immunity protects government officials from discovery and trial.

D. Moving Forward

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.[200] My research has, indeed, undermined the Court's assumptions about the purposes served by qualified immunity doctrine. In this Section, I consider how these findings should shape qualified immunity doctrine moving forward.

My findings suggest that the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility. In *Harlow v. Fitzgerald*, the Supreme Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action."[201] The Court believed that "[t]he transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits."[202] Some—including Justice Thomas—have argued that this transformation was a mistake because the scope of qualified immunity doctrine should mirror the common law de-

%20principles.pdf [http://perma.cc/G9YU-C4UA] (explaining that after the Fourth Circuit held that using a Taser repeatedly in drive-stun mode was unconstitutional, "several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies" in response to the decision); and Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. L.F. 437, 452 n.53, 455 n.68.

199. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580-81 (2008) (observing that, when a United States Supreme Court decision removed the exclusionary rule as a remedy for conduct that violated California constitutional law—searching garbage without a warrant—police in California were "trained to ignore" California law).

200. Anderson v. Creighton, 483 U.S. 635, 641 n.3 (1987).

201. *Id.* at 645 (citing *Harlow*, 457 U.S. at 815-20).

202. Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

fenses that existed in 1871, and should not reflect the Court's policy preferences at all.[203]

This Article offers an additional reason to conclude this transformation was a mistake: the doctrine does not serve its intended policy objectives. Although the Supreme Court repeatedly describes qualified immunity doctrine as a means of shielding government officials from the costs and burdens of litigation, I have found officers are virtually always indemnified, and that qualified immunity is rarely the reason that Section 1983 cases end. Future research can explore whether qualified immunity causes plaintiffs not to file or pursue insubstantial claims, or advances the doctrine's goals in other ways. At this point, however, available evidence contradicts the Court's assumptions about the role qualified immunity plays in constitutional litigation.

Justices sympathetic to qualified immunity's policy goals might conclude based on my findings that they should further strengthen qualified immunity doctrine to protect defendants. I would discourage this approach for several reasons. First, it is far from clear that qualified immunity doctrine is well designed to weed out only "insubstantial" cases. Available evidence suggests that some people may decline to file or pursue their claims because of the cost of litigating qualified immunity, even when they might succeed on the merits.[204] And cases alleging clearly unconstitutional behavior may be dismissed on qualified immunity grounds simply because no prior case has held sufficiently similar conduct to be unconstitutional.[205] Strengthening qualified immunity doctrine would presumably aggravate these preexisting concerns.

Setting aside the question of whether such a shift is desirable, I am not convinced that it is feasible. It is hard to imagine how the Court could make qualified immunity doctrine any stronger than it already is.[206] Perhaps members of the Court believe that lower courts are not applying qualified immunity doctrine as expansively as they should. Indeed, the Court's flurry of recent

203. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act. . . . Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (citations omitted)).

204. *See supra* notes 174-175 and accompanying text.

205. *See supra* notes 182-184 and accompanying text.

206. *See supra* note 183 and accompanying text (describing recent shifts in the doctrine).

summary reversals suggests that it is attempting to encourage lower courts to follow course.[207]

But even if all judges applied qualified immunity doctrine as expansively as does the Supreme Court, qualified immunity doctrine would likely still fall short of its intended role in many cases filed against law enforcement. Plaintiffs could often still plead a plausible entitlement to relief at the motion to dismiss stage, and could often still raise factual disputes at summary judgment that prevent dismissal on qualified immunity grounds. Plaintiffs would continue to include claims against municipalities, claims for declaratory or injunctive relief, and state law claims in their cases that qualified immunity cannot resolve.[208] Defendants would still sometimes conclude that other defenses or an inexpensive settlement is preferable to the added costs of qualified immunity motion practice. And courts would continue to dismiss cases for multiple other reasons besides qualified immunity. Presumably the number of cases dismissed on qualified immunity grounds would increase somewhat, but given litigation dynamics and other applicable doctrines, many cases would remain in which qualified immunity never shielded government officials from discovery or trial. Qualified immunity is the Supreme Court's hammer. But many civil rights damages actions against law enforcement are not nails.

The fact that qualified immunity is often ill suited and unnecessary to advance the Court's policy objectives provides additional reason to adopt Justice Thomas's view and realign the doctrine with historical common law defenses. According to those who have studied the common law at the time Section 1983 was passed, little would remain of qualified immunity if the Court adopted this approach.[209] But other defenses would remain—including arguments that

207. *See* Baude, *supra* note 3 (commenting on numerous summary reversals by the Supreme Court).

208. The Court could conceivably hold that qualified immunity can be asserted by municipalities and in claims for injunctive and declaratory relief. But the Court has already held that qualified immunity does not apply to both types of claims. And the Court has no power to create a qualified immunity defense for state claims.

209. For discussion of the common law and government practices in place when Section 1983 became law, see Alschuler, *supra* note 179, at 506 ("A justice who favored giving § 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*."); Baude, *supra* note 3, at 1 (observing that qualified immunity is justified as "deriv[ing] from a common law 'good faith' defense," but that "[t]here was no such defense"); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010) ("During the early republic, the courts—state and federal—did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability. These were mat-

plaintiffs cannot state plausible claims for relief in their complaint or cannot establish material factual disputes at summary judgment. Defendants would still be able to argue that plaintiffs cannot meet the Court's exceedingly rigorous standards for constitutional violations.[210] Even in the absence of qualified immunity, these other procedural and substantive barriers would prevent many Section 1983 cases from being filed, proceeding to discovery, or advancing to trial.

If the Court is unwilling to eliminate or dramatically restrict qualified immunity, it could make more modest alterations that would align the doctrine with evidence of its role in constitutional litigation. For example, the Court could undo adjustments to qualified immunity doctrine that were expressly motivated by an interest in shielding government officials from discovery and trial in filed cases. In *Harlow*, the Court eliminated consideration of officers' subjective intent because it believed doing so would "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[211] My study shows that the Court's elimination of the subjective prong of qualified immunity in *Harlow* should be viewed as a failed experiment. Despite courts' and commentators' assumptions to the contrary,[212] the decision in *Harlow* appears to have done little to shield government officials from discovery and trial in filed cases.

Restoring the subjective prong to qualified immunity analysis could also mitigate at least one serious concern with the doctrine. Currently, government officials acting in bad faith or with knowledge of the unconstitutionality of their behavior can be shielded from liability simply because no prior case proscribed their conduct. If the subjective prong were restored to the qualified immunity analysis, government officials would not be entitled to qualified immunity if they knew or should have known that their conduct was unlawful. A recent Supreme Court case, *Mullenix v. Luna*, illustrates how reversing *Harlow* might address this concern.[213]

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ters for Congress to adjust through indemnification and other modes of calibrating official zeal.").

210. For discussions of the difficulty of establishing constitutional violations against law enforcement see, for example, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

211. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)).

212. *See supra* notes 6 and 56 and accompanying text.

213. 136 S. Ct. 305 (2015) (per curiam).

The facts relevant to *Mullenix* began when Tulia Police Department officers attempted to arrest Israel Leija, Jr. for violating misdemeanor probation.[214] Leija fled the scene in his car, and officers from several agencies participated in the pursuit. Officers set up spike strips on the highway to puncture Leija's tires as he drove by—a strategy they had been trained to use in just this type of situation. Texas Department of Public Safety Trooper Chadrin Mullenix decided that instead of setting up spike strips he would try to disable Leija's car by shooting at it.[215] He had received no training in shooting at a car to disable it and was instructed by his supervisor not to do so.[216] Nevertheless, Mullenix fired six rounds at Leija's car as it passed under the bridge where Mullenix was standing. Leija died, with one of the shots determined to be the cause of death.[217] Soon after the shooting, Mullenix remarked to his supervisor, "How's that for proactive?"—an apparent reference to a conversation they had had early in the day in which the superior had criticized the officer for not taking enough initiative.[218]

The district court denied Mullenix's motion for summary judgment on qualified immunity grounds, Mullenix filed an interlocutory appeal, and the Fifth Circuit affirmed the district court. The Supreme Court granted Mullenix's petition for certiorari and reversed. The Court did not answer whether Mullenix violated the Constitution but instead held that prior cases had not clearly established that his conduct was unconstitutional.[219] Mullenix's remark to his supervisor played no role in the analysis, as "an officer's actual intentions are irrelevant" to the qualified immunity analysis.[220] Restoring the subjective prong to the qualified immunity analysis would likely change the outcome of a case like *Mullenix*. Mullenix's "How's that for proactive?" statement would once again be relevant to the qualified immunity analysis, and would constitute at least triable evidence of bad faith.[221]

The Court could also reconsider other adjustments to qualified immunity made with the express goal of shielding defendants from burdens of discovery and trial. For example, the Court granted defendants the right to immediately appeal denials of qualified immunity as a means of shielding defendants from

214. Luna v. Mullenix, 773 F.3d 712, 715 (5th Cir. 2014), *rev'd per curiam*, 136 S. Ct. 305 (2015).

215. *Mullenix*, 136 S. Ct. at 306.

216. *Id.* at 306-07.

217. *Id.* at 307.

218. *Id.* at 316 (Sotomayor, J., dissenting).

219. *Id.* at 312 (majority opinion).

220. *Id.* at 316 (Sotomayor, J., dissenting).

221. *See id.*

burdens of discovery and trial.[222] Yet my data show interlocutory appeals of qualified immunity denials infrequently serve that function. Defendants filed interlocutory appeals of 21.7% of decisions denying qualified immunity in whole or part. Of the appeals that were filed, just 12.2% of the lower court decisions were reversed in whole, and just 9.8% of the interlocutory appeals filed resulted in case dismissals. Interlocutory appeals may have prompted case resolutions in another way—39.0% of interlocutory appeals were never decided, apparently because the cases were settled while the motions were pending.[223] But defendants' interlocutory appeals rarely resulted in case dismissals on qualified immunity grounds. It is far from clear that interlocutory appeals shield defendants from litigation burdens—the time and money spent briefing and arguing interlocutory appeals may in fact exceed the time and money saved in the relatively few reversals on interlocutory appeal. If so, the policy objectives motivating *Mitchell* militate in favor of eliminating the right of interlocutory appeal.

Finally, and still more modestly, the Court could reconsider the restrictive manner in which it defines "clearly established law." John Jeffries has written that the Court's narrow definition of clearly established law is inspired by its interest in facilitating qualified immunity dismissals at summary judgment.[224] My data show that the Court's decisions are not having their intended effect. Yet, as others have pointed out, the Court's doctrinal framework creates confusion in the lower courts and protects bad actors when there is no prior case on point.[225] Jeffries's proposed solution is to focus the qualified immunity inquiry not on whether the law was clearly established but, instead, on whether the defendant's conduct was "clearly unconstitutional."[226] I believe that my data support a more complete transformation of the doctrine, but this adjustment would at least be a step in the right direction.

At this point, it is impossible to predict what impact these proposed changes to qualified immunity doctrine would have on the litigation of constitutional claims against law enforcement. Perhaps narrowing the qualified immunity de-

222. *See supra* Section I.B.3.

223. *See supra* Section III.D; *cf.* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1179 (1990) (assessing the impact of interlocutory appeals for qualified immunity denials, and reporting that "the district judges with whom I have spoken . . . all believed that defendants used the *Mitchell* appeal as a delaying tactic that hampered litigation that would otherwise be tried or settled relatively quickly").

224. *See* Jeffries, *supra* note 6, at 866. For the Court's most recent decisions interpreting what constitutes clearly established law, see *supra* note 183.

225. *See supra* notes 176-185 and accompanying text.

226. *See* Jeffries, *supra* note 6, at 867.

fense, restoring the subjective prong, or eliminating qualified immunity altogether would dramatically increase the number of suits filed against the police, or increase the number of filed cases that were settled or tried. On the other hand, these changes might inspire courts to place other limits on Section 1983 claims to maintain the status quo.[227] This Article does not predict how changes to qualified immunity doctrine might influence the collection of doctrines relevant to constitutional litigation, or suggest the ideal ways in which they should relate. My suggestions are motivated by a less lofty ambition – to achieve greater consistency across qualified immunity doctrine's structure, intended policy goals, and actual role in constitutional litigation.

CONCLUSION

In recent years, the Supreme Court has dedicated an outsized portion of its docket to qualified immunity motions in cases against law enforcement because, it has explained, the doctrine is so "important to 'society as a whole.'"[228] But the Court relies on no evidence to back up this fervently held position. Instead, my research shows that qualified immunity doctrine infrequently plays its intended role in the litigation of constitutional claims against law enforcement. Qualified immunity doctrine is unnecessary to shield law enforcement officers from financial liability, and the doctrine infrequently protects government officials from burdens associated with discovery and trial in filed cases. Further exploration of dynamics unobservable through my dataset could reveal other ways in which qualified immunity influences the litigation of civil rights actions against law enforcement. At this point, however, available evidence indicates that qualified immunity often is not functioning as assumed, and is not achieving its intended goals. In an ideal world, all open empirical questions about Section 1983 litigation would be answered before any applicable doctrine was adjusted. But it is my view that the perfect should not be the enemy of the good.[229] The Supreme Court, as well as lower courts, should adjust their qualified immunity decisions to comport with this evidence.

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227. *See* Fallon, *supra* note 59, at 486-89 (observing that adjustments to qualified immunity may influence other aspects of constitutional doctrine).

228. White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015)).

229. *See* Schwartz, *supra* note 16, at 961.